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In The

Supreme Court of the United States

October Term, 1989

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

ALAN L. SHULMAN
SILVERMAN, SHULMAN & SLOTNICK, P.C.
136 East 57th Street
New York, NY 10022
(212) 758-2020

CHRISTIAN A. HORSNELL
Counsel of Record
W. MICHAEL MILOM
WYATT, TARRANT, COMBS, GILBERT & MILOM
1100 17th Avenue, South
Nashville, TN 37212
(615) 320-5551

Attorneys for Petitioner Hank Williams, Jr.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RICHARD H. FRANK, JR.
Counsel of Record
ROBERT J. WARNER, JR.
DEARBORN & EWING
ONE COMMERCE PLACE
NASHVILLE, TN 37239
(615) 259-3560

Attorneys for Petitioners
Wesley H. Rose, Roy Acuff,
Fred Rose Music, Inc. and
Milene Music, Inc.

STEPHEN K. RUSH
Counsel of Record
FARRIS, WARFIELD & KANADAY
Third National Financial Center
Nashville, TN 37219
(615) 244-5200

OF COUNSEL:

LAWRENCE I. FOX
MCDERMOTT, WILL & EMERY
1211 Avenue of the Americas
New York, NY 10036
(212) 768-5400

Attorneys for Petitioners
Acuff-Rose-Opryland Music,
Inc. and Milene-Opryland
Music, Inc.

THOMAS R. LEVY
Counsel of Record
300 East 42nd Street
New York, NY 10017
(212) 682-6110

Attorney for Petitioners
Billie Jean Williams Berlin,
Chappell Music Company and
Aberbach Enterprises, Ltd.

I. QUESTIONS PRESENTED

1. WHETHER THE SECOND CIRCUIT'S FAILURE TO APPLY ANY DISCERNIBLE OR ARTICULATED STANDARD OF REVIEW OF THE DISTRICT COURT'S DECISION TO DISMISS THE COMPLAINT ON GROUNDS OF LACHES, WHICH CONFLICTS WITH ITS OWN EARLIER STANDARD OF REVIEW AND THE ABUSE OF DISCRETION STANDARD OF REVIEW IN OTHER CIRCUITS, IS REVERSIBLE ERROR.

2. WHETHER THE ABUSE OF DISCRETION STANDARD FOR APPELLATE REVIEW OF A DISTRICT COURT DECISION TO DISMISS A COMPLAINT ON GROUNDS OF LACHES IS TO BE ALTERED BECAUSE THE MATTER ARISES IN A SUMMARY JUDGMENT PROCEEDING IN WHICH THE DISTRICT COURT ENGAGED IN A FACT-INTENSIVE INQUIRY WITH EXTENSIVE FACTFINDING.

3. WHETHER IT IS A USURPATION OF A DISTRICT COURT'S POWER FOR A COURT OF APPEALS, WHEN REVIEWING A DISTRICT COURT'S EXERCISE OF EQUITABLE DISCRETION, TO GO OUTSIDE THE RECORD AND TO RELY ON "FACTS" FOUND BY A STATE SUPREME COURT RATHER THAN TO REQUIRE AN APPELLANT TO UTILIZE RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND INITIATE PROCEEDINGS IN THE DISTRICT COURT, THE APPROPRIATE FEDERAL FACTFINDING FORUM.

I. QUESTIONS PRESENTED – Continued

4. WHETHER A COURT OF APPEALS MAY, WITHOUT REGARD TO TIME DEADLINES, WITHDRAW ITS MANDATE AND ALLOW SUCCESSIVE REHEARINGS, AND, IF SO, WHAT CONSTRAINTS EXIST ON THE EXERCISE OF THAT POWER.

5. WHETHER, UNDER FED. R. APP. P. 40(A), A COURT OF APPEALS CAN GRANT A PETITION FOR REHEARING BASED UPON "FACTS" ARISING AFTER ITS INITIAL JUDGMENT.

6. WHETHER, BY ANALOGY TO *GRIGGS V. PROVIDENT CONSUMER DISCOUNT CO.*, THE FILING OF A PETITION FOR A WRIT OF CERTIORARI TERMINATES THE JURISDICTION OF A COURT OF APPEALS TO ADJUDICATE NON-ANCILLIARY MATTERS.

7. WHETHER THE DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TERMINATES THE LITIGATION, OTHER THAN THROUGH A RULE 60(B) PROCEEDING IN THE DISTRICT COURT, OR WHETHER A COURT OF APPEALS CAN, ON A SECOND REHEARING AFTER A DENIAL OF CERTIORARI, REVERSE ITS EARLIER DECISION ON FACTS THAT WERE PRESENTED TO THIS COURT IN THE UNSUCCESSFUL PETITION FOR CERTIORARI.

II. PARTIES TO THE PROCEEDINGS

The parties to the proceedings as they appeared below are set forth in the caption hereof. However, since the commencement of this action certain of the Petitioners have undergone corporate name changes, mergers and/or acquisitions. These changes are set forth below. In accordance with Supreme Court Rule 29.1, the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the corporate Petitioners were listed in Petitioner's Application for Extension of Time, No. A-518, to which this Court is respectfully referred.

Subsequent to the filing of this action, Petitioner Acuff-Rose-Opryland Music, Inc. changed its name to Acuff-Rose Music, Inc. and Petitioner Milene-Opryland Music, Inc. changed its name to Milene Music, Inc. Petitioners Fred Rose Music, Inc. and Milene Music, Inc. have been dissolved and their assets distributed to Petitioners Wesley H. Rose and Roy Acuff as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc. Petitioner Chappell & Co., Inc. has changed its name to Warner/Chappell Music, Inc.

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HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, contained in its Opinion on Petition for Rehearing, decided December 5, 1989, in the matter of *Cathy Yvonne Stone v. Hank Williams, Jr., et al,* No. 88-7860. The Court is also respectfully referred to the inextricably related Petition for

writ of Certiorari in the matter of *Randall Hank Williams v. Catherine Yvonne Stone*, filed with this Court on March 30, 1990.

IV. JUDGMENTS BELOW

The judgment and opinion on second Petition for Rehearing in the matter of *Cathy Yvonne Stone vs. Hank Williams, Jr., et al.*, Docket No. 88-7860, was entered by the United States Court of Appeals for the Second Circuit on December 5, 1989 and is reported at 891 F.2d 401 (2d Cir. 1989). A copy of the judgment and opinion is also appended hereto as Appendix A-1. (The Appendix hereto shall hereinafter be referred to as "App."). The original judgment and opinion of the Second Circuit, dated April 21, 1989, which was vacated by the above, is reported at 873 F.2d 620 (2d Cir. 1989) and a copy thereof is appended hereto as App. B-1. This Court's denial of Respondent's petition for writ of certiorari is reported at 110 S.Ct. 377 (1989), and notice thereof is appended hereto as App. F-3. The opinion and order of the United States District Court for the Southern District of New York in the matter of *Cathy Yvonne Stone v. Hank Williams, Jr., et al.*, Civil Action No. 85 Civ. 7133 (JFK), dated September 6, 1988, is unreported but is appended hereto as App. C-1.

V. JURISDICTION

Petitioners seek review of the judgment on Petition for Rehearing of the United States Court of Appeals for the Second Circuit entered on December 5, 1989 in the case of *Cathy Yvonne Stone v. Hank Williams, Jr., et al.*, Docket No. 88-7860. By order, dated January 19, 1990, this Court granted an extension of time within which to file this Petition for Writ of Certiorari to and including April 4, 1990. (App. D-1). Jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit, dated December 5, 1989, by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

Rule 40(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> Rule 40. **Petition for Rehearing.**
> **(a) Time for Filing; Content; Answer; Action by Court if Granted.** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> Rule 60. **Relief From Judgment or Order.**
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

VII

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

This is an action for declaratory judgment and ancillary relief with respect to Respondent's alleged entitlement to an interest in the renewal term of copyright in musical compositions written by Hiriam "Hank" Williams ("Williams, Sr."). Respondent bases her entitlement upon her alleged status as the illegitimate daughter of Williams, Sr. who died on January 1, 1953, five days before Respondent's birth. (App. at C-1.2).

Williams, Sr. composed more than one hundred (100) musical compositions (the "Works") prior to his death. Williams, Sr. assigned the Works and the copyrights therein to Acuff-Rose Publications, the predecessor to Petitioners Acuff-Rose-Opryland Music, Inc., Milene-Opryland Music, Inc., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc. (the "Acuff-Rose Petitioners"). (App. at C-1.3). Petitioner Fred Rose Music, Inc. acquired the interest of Williams, Sr.'s then minor child, Petitioner Randall Hank Williams, Jr. ("Williams, Jr."), in the renewal term rights in the Works.[1] Billie Jean Williams Berlin ("Berlin") is the widow of Williams, Sr. Petitioner Aberbach Enterprises, Ltd. is the assignee of Berlin's interest in the renewal term rights in the Works. (App. at C-1.2 and C-1.3). The Berlin renewal term rights in the Works are administered by Petitioner Chappell Music Company.

The renewal term of copyright in the Works has been duly obtained by or on behalf of the Acuff-Rose Petitioners and/or Petitioner Aberbach, as the assignees of Williams, Jr. and Berlin. The individual Acuff-Rose

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[1] Petitioners Acuff-Rose-Opryland Music, Inc. and Milene-Opryland Music, Inc. acquired the interest of the remaining Acuff-Rose Petitioners in the Works in May 1985.

Petitioners and Petitioner Aberbach have exercised dominion and control over their respective interests in the renewal term copyrights in the Works since each such petitioner obtained such interest. (App. at C-1.11).

Respondent was born on January 6, 1953 in Montgomery, Alabama to Bobbie W. Jett, an unmarried woman. (App. at C-1.5). Respondent was adopted by Williams, Sr.'s mother, Mrs. Lillian Stone, and her husband, and following Mrs. Stone's death in 1955, was subsequently adopted by George Wayne Deupree and Mary Louise Sims Deupree of Mobile, Alabama.

In 1967, proceedings were commenced in the Circuit Court of Montgomery County, Alabama in the Williams, Sr. estate and the guardianship estate of Williams, Jr. (the "1967-68 proceedings"). In connection with these proceedings, Respondent's existence was formally suggested to the court and the issue of any legal rights which she might have as a possible heir of Williams, Sr. with respect to Williams, Sr.'s estate and the renewal term of copyright in the Works was litigated. (App. J-1 and K-1).

Respondent was represented in the 1967-68 proceedings by a court-appointed guardian ad litem who contacted the Deuprees and advised them of the proceedings. The Deuprees told him that they were not interested in pursuing any claim on behalf of Respondent. Despite the Deuprees' request to the contrary, the guardian ad litem vigorously pursued Respondent's claims. (App. at J-1 and K-1).

After lengthy evidentiary proceedings, the Circuit Court found that (1) Respondent had no right of inheritance from Williams, Sr. under copyright law, (2) Respondent was not an heir of Williams, Sr. and (3) Williams, Jr. was the sole heir of Williams, Sr. (App. at K-1.5 and J-1.3).

In conjunction with Respondent's twenty-first birthday in January 1974, Mrs. Deupree told Respondent that Williams, Sr. was or could be her biological father and that Respondent was entitled to certain funds from the

Estate of Lillian Stone, her first adopted mother. Following these disclosures, Respondent began to seek information relative to Williams, Sr., including reading a book on his life which includes references to the 1967-68 proceedings and to an illegitimate child, allegedly fathered by Williams, Sr., who had been adopted. At that time, Respondent surmised that she might be that child. (App. at C-1.8). Despite this and other information, Respondent made no efforts to prove or otherwise investigate her paternity until years later. (App. at C-1.8).

In 1979, Respondent contacted the Alabama Department of Pensions and Security regarding her biological mother. Respondent told the Department (1) what she had been told by Mrs. Deupree of her relationship to Williams, Sr., (2) that she knew of her identity, (3) that she had read newspaper clippings about Williams, Sr. and knew that there had been mention of her in the papers at the time of the 1967-68 proceedings and, significantly, (4) that she did not want anyone ever to link her with Williams, Sr. Approximately a year later, in December, 1980, Respondent's adoptive father gave Respondent additional information relative to her alleged biological parentage. (App. at B-1.6 and C-1.9).

Petitioners have dealt with and exercised dominion over the copyrights in the Works, both original and renewal term, as the owners of all of the rights therein. Petitioners issued licenses and entered into contracts with respect to the Works; received, disclosed and utilized income from the exploitation of such copyrights and included that income on their federal income tax returns as provided by law; expended sums to exploit the copyright in the Works during the renewal term; otherwise dealt with such rights as the sole owners and beneficiaries thereof; and changed their positions in reliance upon the 1967-68 proceedings and Respondent's failure to assert any claim to an interest in the Works. (App. at C-1.11). In

May 1985, Petitioners Rose and Acuff as trustees in liquidation sold their interest in the renewal term of copyright in the Works to Petitioners Acuff-Rose-Opryland and Milene-Opryland, making substantial warranties and representations relative to their ownership of the Williams, Jr. rights in the renewal term of copyright in the Works, thereby rendering themselves potentially liable for indemnification in the event of a breach of such representations and warranties. (App. at C-1.11). All of these actions were taken in reliance on the absence of any challenge by Respondent to their rights in the Works or the assertion by her of any claim to an interest in any of the rights in the Works.

B. COURSE OF PROCEEDINGS

1. FEDERAL PROCEEDINGS

Respondent filed this action with the United States District Court for the Southern District of New York on September 12, 1985. The operative pleading in this action is the Third Amended Complaint which alleges two (2) claims for relief. (App. G-1). The first claim, alleged against all Petitioners, avers that Respondent is the natural daughter of Williams, Sr. and, as such, is the owner of not less than an undivided one-third (1/3) interest in the renewal term rights in the Works and an appropriate interest in foreign exploitation of the Works. The first claim seeks various relief with respect to Respondent's alleged status and rights arising therefrom. (App. at G-1.19-1.21).

Respondent's second claim alleges a conspiracy to defraud Respondent and a breach of fiduciary duty against the Acuff-Rose Petitioners only, seeking compensatory and exemplary damages. Petitioner Williams, Jr. and the Aberbach Petitioners were not named as parties to the second claim. (App. at G-1.21-1.22).

After exhaustive discovery, the Petitioners submitted a joint Motion for Summary Judgment based on various

grounds. For purposes of such Motion only, it was assumed *arguendo* that Respondent was the biological child of Williams, Sr.

Respondent also moved for partial summary judgment on her claim that she is Williams, Sr.'s natural daughter and thereby entitled to an undivided one-third interest in all renewal rights in the Works. Petitioners Berlin, Chappell and Aberbach moved the District Court for summary judgment and dismissal of the claims against them on separate grounds. (App. at C-1.4).

The District Court granted the Petitioners' joint Motion for Summary Judgment and dismissed the Third Amended Complaint in its entirety, based upon the doctrine of laches, holding that Respondent had unreasonably delayed in asserting her claims and that Petitioners had been materially prejudiced thereby. (App. at C-1.16-1.18). The District Court did not reach or address the other grounds asserted by the Petitioners in their joint Motion for Summary Judgment or the other summary judgment motions. (App. at C-1.4).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. Pursuant to an Opinion dated April 21, 1989, the Second Circuit affirmed the judgment of the District Court (the "Earlier Decision"). (App. B-1).

Respondent submitted a Petition for Rehearing to the Second Circuit which was denied. (App. E-2 and E-3). Respondent subsequently filed a Motion for Recall of Mandate and Order Granting Leave to File Petition for Rehearing and Rehearing in Banc, dated July 31, 1989. (App. E-4). On August 18, 1989, Respondent filed a Petition for Writ of Certiorari before this Court with respect to the April 21, 1989 decision of the Second Circuit. (App. F-1). The Motion for Recall was granted by the Second Circuit on August 24, 1989 (App. E-5), and Respondent submitted her second Petition for Rehearing on September 7, 1989. (App. E-6).

On October 23, 1989, Respondent moved this Court to defer consideration of her Petition pending the Second Circuit's action on her second petition for rehearing. (App. F-2). While the second Petition for Rehearing was pending, this Court, on November 7, 1989, denied Respondent's Petition for a Writ of Certiorari and her motion for deferral. (App. F-3). Subsequently, on December 5, 1989, the Second Circuit granted Respondent's request for a rehearing; conducted the same without notice to, or oral argument by, Petitioners; vacated its earlier affirming decision; reversed the District Court's dismissal of Respondent's complaint and remanded this action to the District Court for further proceedings (the "Instant Decision"). (App. A-1).

2. ALABAMA STATE COURT PROCEEDINGS

Petitioners Williams, Jr., Acuff and Rose and Respondent are also parties to a related proceeding in the state courts of Alabama[2] which has resulted in the issuance of decisions by the Supreme Court of Alabama in the case of *Stone v. Gulf American Fire and Casualty Co., et al.*, Case No. 87-269, dated July 5, 1989, and "On Application for Rehearing," dated November 9, 1989 (the "Alabama Decisions"). (App. H-1 and H-2). Although the Alabama Decisions, which concern the Williams, Sr. estate, should be irrelevant to this action regarding an entitlement to an interest in renewal copyrights[3], such decisions have so

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[2] Neither the remaining Acuff-Rose Petitioners nor the Aberbach Petitioners were or are parties to such action.

[3] Renewal copyrights under both the Copyright Acts of 1909 and 1976 could never be an asset of a deceased author's estate if a widow or children survive into the renewal period, i.e. the statutory period during which a copyright could be renewed. *Frederick Music Co. v. Sickler*, 708 F.Supp. 587

(Continued on following page)

tainted the actions of the Second Circuit that analysis of its conduct will be aided by a succinct statement of the Alabama proceedings.

The Alabama Decisions arose from an action in the Alabama courts instituted (in response to Respondent's demand letter, dated August 5, 1985) by Hank Williams, Jr., Roy Acuff and Wesley Rose against Respondent regarding her alleged entitlement to share in the assets and proceeds of the estate of Williams, Sr. (App. at I-2.2). Respondent counterclaimed against Williams, Jr. for a determination of her status as a child of Williams, Sr. (App. at I-2.3) and filed a third party indemnity action against the administrators of the Williams, Sr. estate, the attorneys for the estate and the insurance company which issued the administrators' bonds. (App. at I-2.3).

Williams, Jr., Acuff and Rose moved for summary judgment on the initial action and Respondent's counterclaim. The third party defendants also moved for summary judgment on the third party indemnity action. The trial court granted all motions for summary judgment but held that, although not entitled to share in the estate, Respondent was the natural daughter of Williams, Sr. (App. at I-2.20 and I-3.3).

Respondent did not appeal the granting of summary judgment on the initial action or her counterclaim, the only actions to which any Petitioners herein were parties, and such judgments became final. Respondent elected to appeal only the granting of summary judgment on her third party indemnity action. It is the appeal from the summary judgment on that action, in which none of the Petitioners were parties, that gave rise to the Alabama Decisions.

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(S.D.N.Y. 1989). Since both Williams, Jr. and Berlin are still living, the renewal copyrights of Williams, Sr. never became an asset of the Estate of Williams, Sr. or subject to the jurisdiction of the Alabama courts.

Despite the uncontroverted fact that none of the Petitioners were a party to the third party action or privies with any party thereto, the Alabama Decisions, in a total disregard of due process, have attempted to deprive Williams, Jr. of vested property rights derived from the estate of Williams, Sr. and the 1967-68 proceedings, including, without jurisdiction to do so, deprivation of ongoing renewal term copyright royalties. (App. at H-1.55).

Due to the unconstitutional deprivation of long-vested property and property rights attempted by the Alabama Supreme Court in the Alabama Decisions, Petitioner Williams, Jr. submitted, on or about March 30, 1990, a Petition for Writ of Certiorari to this Court with respect thereto, to which the Court is respectfully referred. *See Randall Hank Williams, Petitioner v. Catherine Yvonne Stone, Respondent*, Petition for Writ of Certiorari to the Supreme Court of Alabama (the "Alabama Petition"). The Second Circuit decision and the Alabama Decisions are so inextricably related that the separate Petitions should be considered jointly by this Court.

VIII

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The United States Court of Appeals for the Second Circuit has ignored judicially accepted standards for the review of a District Court decision based upon the District Court's discretion – in this case, a finding of laches sufficient to bar Respondent's claims. The Second Circuit even ignored the authority it had previously cited in the Earlier Decision when it had affirmed the District Court's decision and found no abuse of discretion. Indeed, the Second Circuit seemingly got caught up in the emotion of the Alabama Decisions and neglected to articulate any standard of review at all – thereby implicitly adopting a standard of review which does not comport with any known precedent.

Proper respect for the discretion of district judges and careful attention to the standard of review on appeal are critical issues for the efficient and prudent administration of the federal courts. However, the Second Circuit has chosen to follow its own path. Its cavalier disregard for such discretion and standards was clearly inspired by the Alabama Decisions. It is also obvious that the Instant Decision was tainted by the "facts" found in the Alabama Decisions which were rendered with an unconstitutional disregard of due process rights, including the retroactive application of "new" law to divest Petitioner Williams, Jr. of long-vested property and property rights.

The Second Circuit turned the Earlier Decision and that of the District Court on their respective ears by finding "facts" which were not found by the District Court from the undisputed factual record. It was only by reaching outside the facts found in the federal judicial system that the Second Circuit reversed itself and the District Court. The critical "facts" relied upon by the Second Circuit in the Instant Decision were extracted from the "facts" of the Alabama Decisions and represent a tainting of the federal judicial system by the Alabama Supreme Court's unconstitutional actions and legal applications.[4] Such critical "facts" are at odds with the finding of the District Court below.[5]

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[4] Reliance on the Alabama Decisions in this action is particularly egregious. Neither the Aberbach Petitioners, nor any of their predecessors, were parties to the actions in Alabama. (App. at I-1.1). They were never given any right to appear, present evidence or make any arguments therein. They claim no interest in the Estate of Williams, Sr. In fact, Respondent has never asserted any wrongdoing against them. (App. at G-1.13).

[5] The Instant Decision was issued after this Court had denied Respondent's own Petition for Writ of Certiorari in this case with respect to the Earlier Decision and after the Second Circuit had denied Respondent's earlier petition for rehearing.

(Continued on following page)

This case presents an excellent vehicle for this court to reassert the fundamental importance of the standard of review applied by an appellate court and the procedure through which such review should be implemented. In the Instant Decision, this Court can see that checkered procedural history results in procedural chaos and unfairness when the rules for allocation of authority within the federal judiciary are ignored or disobeyed. This case, therefore, provides an excellent vehicle for this Court to provide needed guidance in this area.

A. The Second Circuit Ignored Accepted Standards of Review.

The District Court dismissed Respondent's complaint based upon a finding that Respondent was guilty of laches. (App. at C-1.16-1.19). A determination of laches is one that is made in the discretion of the trial court. In the Earlier Decision affirming the District Court's finding of laches, the Second Circuit found that "[a] ruling on the applicability of laches is overturned only when it can be said to constitute an abuse of discretion." (App. at B-1.8). In support, the Second Circuit cited this Court's decisions in *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956), and *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30 (1951), and its own decision in *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 82 (2d Cir. 1981). (App. at B-1.8).

Totally ignoring the "abuse of discretion" standard, the Instant Decision reversed the District Court's discretionary finding of laches. Nowhere in the Instant Decision is there a finding that the District Court abused its discretion, nor is an abuse of discretion even implied. The

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(App. E-3 and F-3). Respondent's petition for writ was based upon the Alabama Decision of July 5, 1989 and included such decision as an appendix thereto. (App. at F-1.8). Nevertheless, such petition was denied by this Court.

abuse of discretion test is simply ignored by the Second Circuit.

Had the Second Circuit applied the abuse of discretion standard, no abuse could be found. The facts found by the District Court are not clearly erroneous, and the District Court record contains ample evidence upon which the District Court based its findings. *See Olivieri v. Ward*, 766 F.2d 690, 693 (2d Cir. 1985); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975). The Second Circuit itself found the District Court's account of the evidence plausible in its Earlier Decision, only choosing to reverse itself and the District Court when the Alabama Supreme Court chose to view the same facts differently. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985) (" . . . if the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing court may not reverse it . . . ").

The Second Circuit made certain assumptions based upon its review of the Alabama Decisions which it used as support for its suddenly new view of the District Court's findings. None of these assumptions came or could have come from the record on the appeal to the Second Circuit. They came solely from the Alabama Decisions.

By basing the Instant Decision entirely upon assumptions derived only from a state court decision, the Second Circuit clearly ignored the abuse of discretion test and created a new, albeit unarticulated, standard for reversal of a district court's discretionary decision. This new standard is clearly at odds and in conflict with the standards of other circuits, and the previous standard of the Second Circuit, where the abuse of discretion test is the rule. *See generally Morgan v. Kerrigan*, 523 F.2d 917 (1st Cir. 1975); *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81 (2d Cir. 1981); *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3d Cir. 1974); *Watkins v. Northwestern Ohio Tractor Pullers Assoc.*, 630 F.2d 1155 (6th Cir. 1980); *Deitchman v. E.R. Squibb & Sons*,

Inc., 740 F.2d 556 (7th Cir. 1984); *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975).

This Court should grant review in this matter to provide a clear statement that the prevailing view among the circuits is the proper standard of review and consistent with the need for orderly allocation of authority within the federal judiciary and the role of the district court as the determiner of facts.

B. The Abuse of Discretion Standard of Review is Appropriate.

The major role of a trial judge is the determination of facts. Duplication of the trial judge's efforts by an appellate court would result in a huge cost in diversion of judicial resources. *Anderson v. Bessemer City*, 470 U.S. 564, 574-575 (1985). This principle underlies the deference given the trial court's determination of facts under Rule 52(a) of the Federal Rules of Civil Procedure and is not limited to determinations based upon the credibility of live witnesses. *Id.* The same rationale should apply to equitable determinations such as laches where, as here, the District Court has reviewed volumes of evidentiary material and made detailed findings of fact.

The abuse of discretion test is consistent with such rationale. There is no reason to apply any other standard of review to the granting of summary judgment on the ground of laches. Summary judgment in such circumstances necessitates detailed fact-finding by the district court as a prerequisite for the exercise of its equitable discretion. A laches proceeding cannot be reasonably resolved at the District Court level without extensive fact-gathering and judicial fact-finding.[6] In such circumstances, the summary judgment label can be misleading

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[6] Presumably, issuance of summary judgment by the District Court on grounds of laches in the absence of extensive

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because there is extensive presentation of a factual record. These proceedings are more akin to single issue trials, with the summary judgment technique employed as a useful tool for delimiting the nature and character of relevant evidence presented. Although *de novo* review is often utilized in summary judgment actions to determine whether a genuine issue of material fact exists,[7] it was neither appropriate in this matter nor, as will be demonstrated herein, was it undertaken by the Second Circuit.

The Second Circuit not only did not use the abuse of discretion test, it went outside of the record to find facts and then based its interpretation of such facts, contrary to the District Court, on inferences drawn from the Alabama Decisions. "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court deemed innocent'." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 858 (1982), *quoting United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950). The Second Circuit did worse than that. It substituted the interpretations of the Alabama Supreme Court.

C. The Second Circuit Usurped the Role of the District Court By Finding Facts Outside of the Record.

An appellate court has no fact finding function. It cannot receive new "evidence," determine where the

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fact-gathering and fact-finding would be reversible as an abuse of discretion.

[7] *International Union, United Auto., Aerospace and Agricultural Implement Workers v. National Right to Work Legal Defense and Educ. Found., Inc.*, 251 U.S. App. D.C. 75, 781 F.2d 928, 933 (D.C. Cir. 1986).

truth lies, and base its decision on that determination. *Goland v. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 371 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). Fact finding is the function of the trial court.

In formulating the Instant Decision, the Second Circuit made no reference to the record before the District Court or even to the record before it. Instead, it extracted both "facts" and "evidence" from the Alabama Decisions and proceeded to reverse itself and the District Court. As shown herein and in the Alabama Petition, to which this Court is respectfully referred, the reliance by the Second Circuit on the Alabama Decisions is most egregiously misplaced. It has relied upon a process utilized by the Supreme Court of Alabama which totally disregards substantive and procedural due process. In so doing, the Second Circuit gave no credit to the District Court which did not find any fraud on the part of Petitioners (although there urged by Respondent) because, it must be assumed, the District Court refused to apply new law retroactively to standards of behavior which were legal at the time the actions were undertaken[8]. The Second Circuit obviously accepted the legal conclusions and related

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[8] The Alabama Supreme Court, contrary to the District Court, found that the failure of the administratrix of the Estate of Williams, Sr. and her attorney (1) to notify Respondent of possible claims and (2) to advise the Alabama trial court in the 1967-68 proceedings of information relative to the issue of Respondent's paternity possessed by the Alabama Department of Pensions and Security, constituted fraud upon Respondent and the trial court. (App. at H-1.12-1.32). Since Respondent could not have been an heir of Williams, Sr. under then applicable Alabama law (App. at H-1.41-1.43), such action could only constitute fraud if subsequently enacted legislation and subsequent legal determinations were given retroactive effect.

"findings of fact" of the Supreme Court of Alabama, thereby tainting the Instant Decision beyond repair.[9]

In the Instant Decision, the Second Circuit recited a factual background which was clearly appropriated from the Alabama Decision. (*Compare* App. A-1.5-1.7 with H-1.15-1.16, H-1.21-1.23 and H-1.26). All of this evidence was before the District Court and it did not find a genuine issue of material fact which would require a trial.[10] The record before the Second Circuit disclosed that Respondent's Third Amended Complaint had raised the issues of fraud and fraudulent concealment and that such issues were, therefore, before the District Court. (App. at G-1.13-1.19). There is no question that all *relevant facts* were before the District Court. (App. G-4 and G-5). Not only did the Second Circuit find "facts" from somewhere outside the record before it, even worse, it accepted conclusions, based on such "facts," from outside its own judicial system.

In the Instant Decision the Second Circuit quoted from three letters which were *not* part of the record before it. (App. E-1). It then concluded erroneously that these letters were never disclosed to the District Court – a conclusion which could only arise because the letters were not included by Respondent in the Joint Appendix record. (App. E-1). Such letters were, in fact, part of the record before the District Court. They were included in the factual evidence submitted to the District Court by Respondent. (App. G-4 and G-5). The District Court did not consider this evidence to create any genuine issue of

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[9] Such taint is particularly damaging to the Aberbach Petitioners who were not parties to the Alabama action and have never been alleged by Respondent to have committed any wrongdoing. *See* note 4 *supra*.

[10] This issue of fraud was argued by Respondent before the District Court based upon these and many other uncontroverted facts.

material fact relevant to the defense of laches urged by Petitioners and found by the District Court to bar Respondent's claims. (App. at C-1.16-1.18).

Nevertheless, it is apparent that the Second Circuit concluded that Petitioners had intentionally withheld such evidence, and, based upon such erroneous assumption, citing *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F.Supp. 866, 874 (E.D.N.Y. 1978) (an "unclean hands" case), stated:

> "To allow [Petitioners] to bar [Respondent] from claiming her rights when the availability of the laches defense was obtained by them in such an unworthy manner would not only grant [Petitioners] a windfall in this suit to which they are not entitled, but would also encourage a party to deliberately mislead a court." (App. at A-1.9).

Clearly, the District Court was not misled.

The evidence in question was even argued by Respondent in her appeal to the Second Circuit by reference to affidavits submitted by her attorney in the District Court. (App. G-4 and G-5). The Second Circuit should not have allowed itself to be misled by the Alabama Decisions. Unfortunately, it became a determiner of "facts" not even found in the record before it, notably "facts" found by the Alabama Supreme Court.

The Second Circuit went further afield when it adopted other conclusions of the Alabama Supreme Court. It accepted as correct a legal conclusion, made in one of the three letters by the attorney for the Williams, Sr. estate, that Respondent was entitled, in 1962, to an interest in the renewal copyrights of Williams, Sr. (App. at A-1.6). In 1962, such statement was absolutely wrong as a matter of law.[11] The existence of those "rights"

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[11] In 1956, this Court held in *DeSylva v. Ballentine*, 351 U.S. 570 (1956), that one's status as a "child" for purposes of entitlement to an interest in the renewal term of copyright in a work

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remains a matter of unsettled law and is precisely the question presented to the District Court in this action.

The Second Circuit also mistakenly assumed that the letters and other evidence of the behavior of persons connected with the Williams, Sr. estate in the early years were not before the Alabama trial court in 1985. (App. at A-1.9). Evidence of such activities was, in fact, before the Circuit Court of Alabama in 1985.[12] (App. I-1).

The Second Circuit strayed even further from the facts in the record below when it concluded that Petitioners "could have sought a court declaration of their rights vis-a-vis [Respondent]." (App. at A-1.9). The existence of Respondent was disclosed to the courts of Alabama in the 1967-1968 proceedings and her rights were determined therein. (App. J-1 and K-1). Petitioners Williams Jr., Acuff and Rose sought declaratory judgment as to Respondent's alleged rights in 1985 in the Circuit Court of Alabama. (App. at I-2.2).[13] Here, the Second

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would be determined by reference to whether a person was an heir under applicable state law. Although the illegitimate child in *DeSylva* was an heir under applicable California law, as the Alabama Supreme Court recognized, from her birth in 1953 until the law changed in 1982, Respondent could not have been an heir of Williams, Sr. under applicable Alabama law. (App. at H-1.42 and H-1.48).

[12] Despite such evidence, both the District Court and the Alabama trial court found in favor of Petitioners. The Alabama trial court specifically found that there was no fraud since any disclosures which might have been made would have been legally superfluous. (App. at I-2.19). The District Court must also have found them to be so since it necessarily determined that the Petitioners were entitled to judgment as a matter of law. (App. at C-1.19).

[13] It is to be noted in this connection that the District Court in 1986 had denied Petitioner's motion to stay the District Court proceedings based upon the prior existence of such

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Circuit found facts [the non-existence of affirmative action by Petitioners] which are wholly false.

All of the "evidence" referred to in the Instant Decision was before the District Court and before the lower courts in Alabama. It is only the intervention of the Alabama Decisions with all of their unconstitutional defects of law that has corrupted the orderly process of the federal judiciary.

It is astonishing that the Second Circuit permitted itself to be guided, and its decision-making corrupted, by the Alabama Decisions when faced with the appropriate and vigorous dissents to those decisions by Alabama Justice Janie C. Shores.[14] (App. at H-1.56-1.57 and H-2.14-2.16). The Second Circuit not only ignored the caveat created by such dissents but proceeded to ignore the judicial precedent of this Court and its own prior decision, thereby departing from the usual and accepted course of judicial proceedings in a manner which mandates a review by this Court.

D. Recall of Mandate and Second Petition for Rehearing.

1. Recall of Mandate and Granting of Second Rehearing Was Improper.

Respondent lost her appeal to the Second Circuit (April 21, 1989). She then petitioned for rehearing under

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declaratory judgment action in the Alabama Circuit Court. Thus, of course, the fact that Petitioners had "sought a court declaration" was known to the District Court below. (App. G-2 and G-3).

[14] It is equally alarming that the Second Circuit utilized the Alabama Decisions in this action against the Aberbach Petitioners since they had *no part* in the Alabama actions. (App. I-2). The Aberbach Petitioners do not share in any portion of the Williams Sr. estate and were not involved in the administration thereof or in the 1967-68 proceedings.

the Federal Rules of Appellate Procedure (May 4, 1989). That petition was denied (May 23, 1989). Respondent then filed a motion for the recall of the mandate and requested a second rehearing (August 1, 1989), which request was triggered by the first Alabama Decision rendered on July 5, 1989. While the motion to recall the mandate was pending, Respondent filed a Petition for a Writ of Certiorari with this Court (August 18, 1989). While the Petition for Certiorari was pending, the Second Circuit granted Respondent's motion for leave to file a second petition for rehearing and recalled the mandate which had issued on June 5, 1989. A second petition for rehearing was submitted to the Second Circuit by Respondent on September 7, 1989.

On October 23, 1989, Respondent requested that this Court defer consideration of her Petition for Certiorari pending the outcome of the second rehearing petition in the Second Circuit. On November 6, 1989, this Court rejected Respondent's request for deferral and denied her Petition. On December 5, 1989, the Second Circuit granted Respondent's second petition for rehearing and reversed its Earlier Decision.

Neither statutes nor the Federal Rules of Appellate Procedure authorize a second or successive petition for rehearing. *National Latex Prod. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir.), *cert. denied*, 362 U.S. 989 (1960); *see* Fed. R. App. P. 40(a). Indeed, the Federai Rules of Civil Procedure seem to contemplate a filing in the District Court if there is a reason that a matter that has become final warrants reopening. Fed. R. Civ. P. 60(b). *See Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958) (Rule 60(b) applies to the District Courts, not the Courts of Appeal). The forum in which mistakes, newly discovered evidence, or fraud should be considered is the District Court, where facts can be gathered and proof presented.

The dangers of a permissive doctrine of timeless multiple requests for rehearing and a timeless authority

for an appellate court to withdraw its mandate are presented in this case. This Court declined to defer consideration of Respondent's Petition for Certiorari and ended this litigation by its denial of Certiorari. But the Second Circuit's agreement to withdraw its mandate, after it had already denied a request for rehearing and while the matter was pending in this Court, reflects the disorderliness of the process invoked below. There is no statutory or other provision for withdrawal of the mandate by a Court of Appeals after a petition for rehearing has been denied. There is no statutory or other provision for granting multiple or successive requests for rehearing. There is, however, a provision in the Federal Rules of Civil Procedure [Rule 60(b)] for reopening final judgments on grounds of fraud or mistake.

It is worthy of this Court's attention to determine whether (a) a Court of Appeals may, without regard to time deadlines, withdraw its mandate and allow successive rehearings; and, if so, (b) what constraints exist on the exercise of that power. *See, e.g., Greater Boston Television Corp. v. FCC*, 149 U.S. App. D.C. 322, 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Armster v. United States Dist. Court*, 806 F.2d 1347, 1356 (9th Cir. 1986) (no rehearing should be granted on the basis of a subsequent development that involved factual events or occurrences rather than the issuance of a new controlling legal opinion); *Goland v. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 370-71 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980) (newly discovered "facts" outside the record before it cannot be the basis for vacating an appellate opinion); *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (semble).

2. Second Petition for Rehearing was Improper.

Under Fed.R.App.P. 40(a), a petition for rehearing must state "the points of law or fact which in the opinion

of the petitioner the court has overlooked or misapprehended." To the extent that the "facts" found by the Alabama Decisions were not in the record before the Second Circuit, they could not have been *overlooked* or *misapprehended*. The Alabama Decisions occurred subsequent to the Earlier Decision. To the extent they constitute "facts," they are not properly the subject of a petition for rehearing. As noted by the Ninth Circuit, "[A] panel is simply not capable of having *overlooked* or *misapprehended* 'points of . . . fact' occurring *subsequent* to its initial decision." *Armster v. United States Dist. Court*, 806 F.2d 1347, 1356 (9th Cir. 1986) (emphasis in original). The second petition for rehearing was outside of the bounds of Fed.R.App.P. 40(a) and should not have been granted.

In granting Respondent's second petition for rehearing based upon the Alabama Decisions, which were subsequent to and outside of the record before it, the Second Circuit has exceeded the usual and accepted course of judicial proceedings and its actions should be reviewed by this Court.

E. Jurisdiction of Court of Appeals After Submission and/or Denial of Writ of Certiorari.

As indicated in the previous section, the posture of this action is a veritable jigsaw puzzle of procedural machinations worthy of a law school examination. For purposes of this analysis, the critical facts are that, on August 24, 1989, the Second Circuit granted Respondent's motion for leave to file a second petition for rehearing and recalled its mandate, which had issued on June 5, 1989. At that time, Respondent's Petition for a Writ of Certiorari was pending before this Court, having been filed on August 18, 1989. This Court subsequently (November 6, 1989) denied the Petition for Certiorari and rejected Respondent's request for deferral of consideration of the Petition for Certiorari pending further decisions by the Second Circuit. Thereafter, on December 5,

1989, the Second Circuit granted Respondent's petition for rehearing and reversed its Earlier Decision.

The precise effect of the submission of a petition for writ of certiorari on the jurisdiction of a Court of Appeals has never been decided by this Court. The issuance of a mandate terminates the jurisdiction of an appellate court, but so long as a case is *sub judice* a court of appeals should entertain a petition for rehearing based on a change in state law. *Huddleston v. Dwyer,* 322 U.S. 232 (1944). However, no petition for writ of certiorari had been filed in *Huddleston*[15] and, here, there was no change in relevant state law.

In *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982), this Court ruled that a notice of appeal filed in a Court of Appeals was void when a motion enumerated in Rule 4(a)(4) of the Federal Rules of Appellate Procedure was pending in the District Court. In *Griggs* this Court observed that two courts should not attempt to assert jurisdiction over a case simultaneously. Similarly, in *FCC v. League of Women Voters, supra,* this Court went to great lengths to note that the pending issue in the Court of Appeals was entirely ancillary to the merits of the case then before this Court. The important question of the jurisdiction of the Court of Appeals over a case once a petition for writ of certiorari has been submitted to this Court should be decided by this Court.[16]

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[15] A pending petition for writ of certiorari has been held by the Fifth Circuit not to deprive the Court of Appeals of jurisdiction to correct clerical mistakes. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.,* 296 F.2d 215 (5th Cir.), *cert. denied,* 368 U.S. 890, *reh'g denied,* 368 U.S. 936 (1961). Substantive changes were not considered. To Petitioners' knowledge, this Court has never ruled on this important issue. *Cf. FCC v. League of Women Voters,* 468 U.S. 364, 373 n.10 (1984).

[16] It should be noted that Respondent requested that this Court defer its decision on her Petition with respect to the

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Of even greater significance is the question of the effect of a denial of a petition for writ of certiorari upon the jurisdiction of a Court of Appeals. On this issue there appears to be a conflict between the circuits.

In both the Instant Decision and *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427, 429 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970), the Second Circuit assumed it had the power to decide a petition for rehearing after this Court had denied a petition for writ of certiorari. The impropriety of exercising such authority is particularly compelling in this case because the grounds for Respondent's second Petition for Rehearing were the same grounds upon which she relied in her unsuccessful petition for certiorari.

In contrast to the Second Circuit's position is that of the Sixth Circuit in *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967), which declared that the denial of certiorari signifies that appellate review has been exhausted. *Cf. Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982) (holding that a denial of certiorari by this Court ended that litigation so that further appellate court relief was unavailable).

The actions of the Second Circuit in the Instant Decision indicate the danger of the uncertainty of this question and the need for clarification by this Court of this important jurisdictional and procedural matter.

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Earlier Decision pending the Second Circuit's action on her second Petition for Rehearing and that such request was denied by this Court. (App. F-2 and F-3).

IX. CONCLUSION

Without the taint of the Alabama Decisions the Second Circuit reviewed the record before it and found no abuse of discretion in the District Court's granting of summary judgment in favor of Petitioners. This Court denied certiorari. The Second Circuit then improperly recalled its mandate and granted Respondent a second rehearing based on the Alabama Decisions. It ignored its own standards of review and reached outside the record before it, outside of the federal system, and found "facts" and "evidence" from the subsequent Alabama Decisions and, based upon such "facts" and "evidence" and erroneous emotional assumptions derived therefrom, reversed itself and the District Court. The Second Circuit's actions are in conflict with decisions of this Court and other circuits. In so doing, the Second Circuit has engaged in conduct outside of the usual and accepted course of judicial proceedings. Petitioners respectfully request that this Court grant certiorari to review the judgment of the Second Circuit, dated December 5, 1989.

Respectfully submitted,

CHRISTIAN A. HORSNELL
Counsel of Record
W. MICHAEL MILOM
WYATT, TARRANT, COMBS,
GILBERT & MILOM
1100 17th Avenue, South
Nashville, TN 37212
(615) 320-5551

OF COUNSEL:

ALAN L. SHULMAN
SILVERMAN, SHULMAN & SLOTNICK, P.C.
136 East 57th Street
New York, NY 10022
(212) 758-2020

Attorneys for Petitioner
Hank Williams, Jr.

RICHARD H. FRANK, JR.
Counsel of Record
ROBERT J. WARNER, JR.
DEARBORN & EWING
One Commerce Place
Nashville, TN 37239
(615) 259-3560

Attorneys for Petitioners Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc.

STEPHEN K. RUSH
Counsel of Record
FARRIS, WARFIELD & KANADAY
Third National Financial Center
Nashville, TN 37219
(615) 244-5200

OF COUNSEL:

LAWRENCE I. FOX
McDERMOTT, WILL & EMERY
1211 Avenue of the Americas
New York, NY 10036
(212) 768-5400

Attorneys for Petitioners Acuff-Rose-Opryland Music, Inc. and Milene-Opryland Music, Inc.

THOMAS R. LEVY
Counsel of Record
300 East 42nd Street
New York, NY 10017
(212) 682-6110

Attorney for Petitioners Billie Jean Williams Berlin, Chappell Music Company and Aberbach Enterprises, Ltd.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION ON PETITION
FOR REHEARING

No. 732 – August Term 1988
(Argued February 1, 1989
Decided April 21, 1989)
(Petition for Rehearing Filed
September 7, 1989
Decided Dec. 5, 1989)

Docket No. 88-7860

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., a Delaware Corporation, ABERBACH ENTERPRISES, LTD., a New York Corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE AND ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE,
Circuit Judges

Petition for rehearing under Fed. R. App. P. 40 made by Cathy Yvonne Stone of this panel's decision in *Stone v. Williams*, 873 F.2d 620 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3301 (U.S. Nov. 7, 1989) (No. 89-295), that affirmed the grant of summary judgment dismissing appellant's complaint on the grounds of laches in the United States District Court for the Southern District of New York (Keenan, J.).

Petition for rehearing granted. Prior opinion vacated and case remanded to the district court.

MILTON A. RUDIN, Beverly Hills, California (Joseph L. Golden, Rudin & Appel. Beverly Hills, California; Kenneth E. Warner, Coblence Warner Hamilton & Smith, New York, New York, of counsel), *filed a brief for Plaintiff-Appellant.*

ALAN L. SHULMAN, New York, New York (Robert J. Warner, Richard H. Frank, Jr., W. Michael Milom, Christian A. Horsnell, Silverman, Shulman & Slotnick, New York, New York, of counsel), *filed a brief for Defendants-Appellees, Hank Williams, Jr., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc.*

THOMAS R. LEVY, New York, New York, *filed a brief for Defendants-Appellees, Billie Jean Williams Berlin, Chappell Music Company and Aberbach Enterprises, Ltd.*

LAWRENCE I. FOX, New York, New York, (Stephen K. Rush, Dianna Baker Shew, Berger & Steingut, of counsel), *filed a brief for Defendants-Appellees, Acuff-Rose Opryland Music, Inc. and Milene-Opryland Music Inc.*

CARDAMONE, *Circuit Judge:*

Pursuant to an order entered August 24, 1989, granting her leave to file a petition for rehearing, Cathy Yvonne Stone petitions this panel under Fed. R. App. P. 40 for a rehearing. She had appealed from a judgment of the United States District Court for the Southern District of New York (Keenan, J.) granting summary judgment to defendant in an action plaintiff brought seeking her purported share of copyright renewal rights to songs composed by Hank Williams, Sr., her natural father. Defendants are the son and common-law wife of the late singer, and several individuals and corporations that are assignees of the copyrights to Hank Williams' songs. Judge Keenan ruled that plaintiff's claim was barred by laches. We affirm the district court in an opinion dated April 21, 1989, *Stone v. Williams*, 873 F.2d 620 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3301 (U.S. Nov. 7, 1989) (No. 89-295).

The petition for rehearing of the appeal is granted. The April 21st opinion and judgment of this Court are vacated, and the matter is remanded to the district court for further proceedings.

I

At the time of plaintiff's appeal before us, she also had pending an appeal to the Supreme Court of Alabama where she sought to have her father's estate opened and to obtain her proportionate share of that estate. The defendants on that appeal included Irene Smith (Hank Williams' sister and the administratrix of his estate at the time plaintiff's claim to the estate was originally decided)

and Robert Stewart (Williams' attorney). In order to achieve that ultimate relief, Ms. Stone necessarily also petitioned the Alabama Supreme Court to set aside two orders entered in 1967 and 1968 by the Montgomery Circuit Court which, though acknowledging that Hank Williams was her natural father, declared that she was not an heir to his estate.

On July 5, 1989, the Supreme Court of Alabama reversed the trial court's award of summary judgment to defendants finding that they had intentionally, willfully and fraudulently concealed plaintiff's identity, existence, claim and rights as a natural child of Hank Williams, Sr. The court determined that defendants' fraud, along with other errors of law, presented sufficient grounds to set aside the 1967 and 1968 decrees that declared that plaintiff was not an heir to Williams' estate. This fraud, the court continued, excused plaintiff's delay in asserting her claim, and it held therefore that plaintiff had asserted her rights timely. It further found substantial evidence in the record that could indicate to a factfinder that defendants fraudulently conspired to keep certain facts relating to plaintiff's existence, identity and potential claim concealed from the courts of Alabama.

A.

A brief review of some of the factual background is necessary to understand the present posture of the matter now before us. When the famous country and western singer Hank Williams died (a few days before plaintiff was born) his mother, Lillian Stone, legally adopted

plaintiff. Hank Williams's sister, Irene Smith, had promised to care for plaintiff in the event that Lillian Stone was unable to. After Lillian Stone's death, Smith reneged on her promise, saying she wanted to avoid the "publicity and gossip" associated with the baby, and that it would be in the child's best interests to be put up anonymously for adoption. But a letter written earlier by Smith to attorney Stewart in 1954 suggests that Smith may have been motivated by more selfish reasons. Pertinent parts of that letter state:

> The idea you have about making Billy [Hank Williams' reputed widow] a legal wife isn't bad at all but I fear that once you accept her as one she will try every trick in the book. I keep thinking about the time when it will be necessary to renew copyrights on Hank's songs, as his legal wife she will be the one to do that unless of course that is one of the rights she gives up. Somehow I just can't picture her giving anything up.
>
> * * *
>
> Thanks for sending the royalties check. It sure came in handy. . . . I want to thank you again for looking out for me. You know if mother adopts that child there will be a new will. Tee [Smith's husband] says that if she adopts it and then can't take care of it, he is not going to let me take it. Keep this under your hat, mabey [sic] it will never be necessary for me to have the child at all. I feel that poor child would have a lot better chance in this life if it were adopted by someone that would never know of its origin at all. . . . Oh, well I guess I sound like I just don't want mother to change her will but really that isn't it at all. . . .

Additional correspondence between attorney Stewart and legal counsel for Wesley Rose, one of the copyright assignees, reveals Stewart's early knowledge of plaintiff's claim to the copyright renewals. Relevant language in a letter from Rose's counsel to Stewart, dated February 28, 1962 stated:

> There is no way of evaluating now what a share of the renewal copyrights would be worth and no one could predict their valuation. We feel that a nominal payment might forever cut off the right of this child to the renewals. . . .

Stewart's letter in response, dated July 5, 1962, noted:

> Since the statutory right of the child comes to it through its father, and since the federal courts have held this right belongs to an illegitimate, we may be faced with a difficult problem, and certainly one we would not want to litigate. . . .

Stewart then listed several alternative ways that plaintiff's rights to the renewals might be cut off.

In 1967 Audrey Williams, Hank Williams' former wife (now deceased), petitioned for final settlement of the estate on behalf of her son Hank Williams, Jr. Attorney Stewart was called to testify by a guardian ad litem representing plaintiff. Although he produced a child support and custody agreement executed by Williams – which provided that plaintiff would be cared for by Williams – he did not divulge to the court information he had respecting other matters relating to plaintiff's claim to an interest in her father's estate.

In 1967 and 1968 the Montgomery County Circuit Court accordingly ruled that plaintiff was not an heir to

Williams' estate. Despite this ruling, when in 1969 Stewart became administrator of Williams' estate (succeeding defendant Smith), he began setting aside a share of the estate for plaintiff's benefit. At one time he wrote to Williams, Jr.'s attorney: "the last two distributions to Randall . . . were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child." When Williams' estate was closed in August 1975, the portion set aside for plaintiff was distributed along with the other estate assets.

B.

Based upon this evidence the Supreme Court of Alabama concluded there was sufficient evidence of fraud perpetrated against Cathy Stone to make disposition of her case by summary judgment on that issue inappropriate. The court also examined whether plaintiff's claim should be barred by laches, and ruled that plaintiff's delay was excusable. The Alabama Supreme Court reasoned that she was permanently removed at age three from the city of her birth to another city for the express purpose of making it highly unlikely that she would discover her father's identity; all public records that might have revealed her paternity were ordered sealed; plaintiff had no idea of her relationship to Williams until 1974, and even then when the matter was first presented to her it was presented as mere speculation; the findings of the Alabama trial court in 1967 and 1968 (declaring that plaintiff was not an heir) were tainted by intentional fraud on the part of the administratrix and attorney of Williams' estate; and finally, plaintiff made prompt demand for her share of her father's estate as soon as she

received the sealed records containing firm evidence of her paternity.

II

Although not bound by the decision of the Alabama Supreme Court – its decision involved different parties and applicable law – we believe that its finding of fraud requires a reappraisal of our decision made before that court ruled. *Cf. Bott v. Four Star Corp.*, 807 F.2d 1567, 1576 (Fed. Cir. 1986) (defendant's egregious conduct may defeat its laches defense); *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F. Supp. 866, 874 (E.D.N.Y. 1978) ("one who seeks Equity's assistance must stand before the court with clean hands"). More particularly, the finding of fraud warrants a reassessment of the prejudice to defendants that may result should we permit plaintiff's claim to proceed on the merits. *See, e.g., Czaplicki v. the Hoegh Silvercloud*, 351 U.S. 525, 534 (1956); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980). We recognize that the principal defendants in the action before us are Hank Williams, Jr. and Billie Jean Williams Berlin, Hank Williams, Sr.'s common-law wife, not the administratrix and attorney of Williams' estate, as in the Alabama action. However, recited evidence in the Alabama court makes clear that the present defendants were aware of plaintiff's rights to the copyright renewals long before plaintiff. Irene Smith, who was instrumental in concealing from plaintiff evidence of who her father was, acted as Hank Williams, Jr.'s guardian during the 1967-68 proceedings. Similarly, Smith, as administratrix, and Stewart, as attorney, of Hank Williams' estate, conspired to conceal from Cathy Stone her potential rights, and took pains to cut off

those rights. These actions of his guardian benefited Hank Williams, Jr. Hank Williams, Jr.'s counsel was further advised by Stewart that a portion of the estate income was being withheld for appellant. Williams, Jr. never disavowed Stewart's actions, or mentioned any of these facts in prior court proceedings in Alabama in 1985 or in the district court proceeding we earlier reviewed and to which he and plaintiff were parties.

The prejudice to defendants we identified in our prior opinion, 873 F.2d at 625, would not have existed but for the failure of the present defendants to reveal the facts of which they had knowledge. Defendants could have sought a court declaration of their rights vis-a-vis plaintiff. Instead they chose to remain silent. They should not now be allowed to claim that they are prejudiced by plaintiff's present assertion of her rights when they were aware of them all along.

Consequently, in reassessing the equitable circumstances peculiar to this case, the equities fall on plaintiff's side. The present litigation is a contest, after all, between Hank Williams' heirs over copyright renewal rights. To allow defendants to bar plaintiff from claiming her rights when the availability of the laches defense was obtained by them in such an unworthy manner would not only grant defendants a windfall in this suit to which they are not entitled, but would also encourage a party to deliberately mislead a court. Courts of equity exist to relieve a party from the defense of laches under such circumstances. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946).

Consequently, the evidence of fraud, which the Alabama Supreme Court found persuasive, makes summary judgment dismissing plaintiff's claim on the grounds of laches inappropriate. The figure representing justice is blindfolded so that the scales are held even, but justice is not blind to reality. Plaintiff therefore should have her day in court and an opportunity to have a jury determine the merits of her claim.

III

Plaintiff also requests a rehearing *en banc*. She claims an *en banc* hearing is merited because the dismissal of her claim on the ground of laches contradicts copyright law established by the Supreme Court in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) and *Menendez v. Holt*, 128 U.S. 514 (1888), and by us in *New Era Publications International v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989). Since the dismissal of the case on laches grounds which this panel originally affirmed is now reversed, we need not decide this question.

IV

The petition for rehearing is granted. The previous opinion of this Court of April 21, 1989, *Stone v. Williams*, 873 F.2d 620 (2d Cir. 1989), is vacated, and replaced by the present opinion which now reverses the dismissal of plaintiff's complaint by the district court on the ground of laches. The matter is remanded to the district court for further proceedings on the merits.

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 732 - August Term, 1988

(Argued February 1, 1989 Decided APR 21, 1989)

Docket No. 88-7860

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., a Delaware Corporation, ABERBACH ENTERPRISES, LTD., a New York Corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE
Circuit Judges

Cathy Yvonne Stone appeals the judgment of September 7, 1988 of the United States District Court for the

Southern District of New York (Keenan, J.) granting defendants' motion for summary judgment on the ground of laches, and denying her cross motion for summary judgment, and dismissing her complaint.

Affirmed.

MILTON A. RUDIN, Beverly Hills, California (Joseph L. Golden, Susan H. Green, Rudin & Appel, Beverly Hills, California; Marjorie M. Smith, Coblence Warner Hamilton & Smith, New York, New York, of counsel), *for Plaintiff-Appellant.*

ALAN L. SHULMAN, New York, New York (Robert J. Warner, Jr., Richard H. Frank, Jr., W. Michael Milom, Christian A. Horsnell, Silverman, Shulman & Slotnick, New York, New York, *Attorneys for Defendants-Appellees Hank Williams, Jr., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc., and Milene Music, Inc.*; Lawrence I. Fox, Stephen K. Rush, Katherine M. Allen, Berger & Steingut, New York, New York, *Attorneys for Defendants-Appellees Acuff-Rose Opryland Music, Inc. and Milene-Opryland Music, Inc.*; Thomas R. Levy, New York, New York, *Attorneys for Defendants-Appellees Billie Jean Williams Berlin, Chappell Music Company and Aberbach Enterprises, Ltd.*, all of counsel), *for Defendants-Appellees.*

CARDAMONE, *Circuit Judge:*

Cathy Yvonne Stone brought this action in the United States District Court for the Southern District of New York (Keenan, J.) for her purported share of copyright renewal rights to songs composed by Hank Williams, Sr.,

her natural father. The defendants in this action are Hank Williams, Jr., the son of Hank Williams and stepson of Billie Jean Williams Berlin, who was married to Hank Williams at the time of his death, and a number of music companies or individuals that have obtained an interest in the copyright proceeds of the Williams' songs including: Aberbach Enterprises; Chappell Music Company; Acuff-Rose Opryland, Inc.; Milene-Opryland Music, Inc.; Fred Rose Music, Inc.; Milene Music, Inc.; Roy Acuff; and Wesley H. Rose. The sole issue presented is whether the district court abused its discretion when it granted defendants' motion for summary judgment and dismissed appellant's complaint on the grounds of laches. Even granting to Ms. Stone's situation the fullest stretch of sympathy, her own delay and procrastination in the end bars her suit. The district court's judgment, therefore, is affirmed.

I FACTUAL BACKGROUND

The dispute arises over copyright renewal proceeds for 60 published and copyrighted songs written or performed by country and western singer Hank Williams (Williams, Sr.) who died intestate on January 1, 1953 at the age of 29. During his lifetime the well-known singer and composer wrote such popular hits as "Your Cheatin' Heart" and "Hey Good Lookin' ". We set forth the facts briefly in chronological order.

Appellant Stone was born on January 6, 1953 in Alabama, five days after Williams, Sr. died. While Ms. Stone's biological mother, Bobbie Jett, was pregnant with her in October of 1952, she and Williams, Sr. executed an

agreement under which he acknowledged that he might be the father of appellant, but specifically did not admit paternity. The agreement further provided that Williams, Sr. pay Bobbie Jett for Ms. Stone's support, and placed the infant's custody until age 2 in Lillian Williams Stone, mother of Williams, Sr., who was present at the drafting and the execution of the agreement together with the two principals. Pursuant to its terms, Lillian Stone adopted plaintiff, and Bobbie Jett left for California. Until her death in 1955 Mrs. Stone cared for appellant. At that point, Williams, Sr.'s sister, Irene Smith, reneged on her promise to care for Cathy Stone if anything happened to Lillian Stone. As a result, appellant became a ward of the State of Alabama, and at age three in 1956 a foster child of the Deupree family. The Deuprees adopted her in 1959.

Williams, Sr. had a son, Hank Williams, Jr. The assignment of Hank Williams, Jr.'s copyright interests in his father's music generated litigation in 1967 and 1968 in the Circuit Court of Montgomery County, Alabama. That court appointed a guardian *ad litem*, attorney Drayton Hamilton, to ascertain any unknown potential heirs to the Williams estate and to represent their interests. After investigating, Hamilton concluded that the only such person was appellant Stone. Unbeknownst to Ms. Stone, her adoptive family, the Deuprees, had asked Hamilton to leave her out of the 1967 proceedings, because they thought it unlikely that she would win and were worried that their then 14-year-old daughter would be subjected to embarrassing publicity because of her status as the illegitimate child of a famous country western singer. Nonetheless, Hamilton zealously litigated Ms. Stone's interests, but to no avail. The Alabama court determined

that Hank Williams, Jr. was the sole heir of his father, and further held that appellant, as a natural child who had been adopted by another family, had no rights in any proceeds from the Williams, Sr.'s songs or their renewal rights. In reaching this conclusion, it relied on *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that courts must look to state law to determine child's legal status for inheritance before evaluating the child's renewal rights under the Copyright Act).

After the disruptive first few years of her life, Ms. Stone appears to have enjoyed an ordinary childhood, and developed a closely bonded relationship with the Deuprees, with no knowledge of her natural parents. Then, in late 1973, shortly before appellant's 21st birthday, Mrs. Deupree told her of the rumors regarding the identity of her natural father, but added that everything had been decided against her. This disclosure was necessary because, upon turning age 21, Ms. Stone was entitled to a small inheritance from Williams, Sr.'s mother, Lillian Stone. The Deuprees were concerned that appellant might encounter reporters while claiming the inheritance and wanted to arm her with knowledge. After picking up the inheritance check (about $3,800) at the Mobile County Courthouse, Ms. Stone went to a library and read a biography on Williams, Sr., entitled *Sing a Sad Song*, written by Roger Williams. This book mentioned the possibility that Williams, Sr. had fathered an illegitimate daughter, and the author speculated on the child's entitlement to a renewal interest in his songs. Ms. Stone surmised that she might be that daughter.

In the following years, appellant asked the Deuprees about her background and talked to some attorney acquaintances, but did little else to ascertain her connection to Williams. She recalls that the Deuprees told her that there was nothing more to do. In 1979, she met with personnel from the state agency responsible for adoptions – the Alabama Department of Pensions and Securities – but states that she no longer remembers the substance of the conversation. The record, including appellant's deposition, suggests that her feelings about Williams' parentage were ambivalent.

Her attitude crystallized in 1980 when she received a telephone call from her adoptive father, George Deupree. Evidently alluding to his decision not to pursue Ms. Stone's rights in the 1967-68 lawsuits, Deupree told her that he had undergone a change of heart after seeing Hank Williams, Jr. on a television show. Deupree has since died, but appellant related the conversation in her deposition: "I want to ask you if you would like to find out if Hank Williams is your father. He said think about it. And he said I will help you in any way that I can. And he said I think I was wrong in withholding information from you and not discussing it. And I will do everything I can to help you."

Following this call, Ms. Stone stepped up her efforts to learn about her relationship to Williams, Sr. she looked up newspaper articles about him, and sought out his relatives and those of her natural mother, Bobbie Jett, who had also since died. She met with attorney Hamilton, her former guardian *ad litem*, and discussed with him the 1952 custody and support agreement between Bobbie Jett and Williams, Sr., and obtained the records from the 1967

and 1968 Circuit Court proceedings. But Ms. Stone did not examine those documents until after she met attorney Keith Adkinson (who later became her husband) in 1984.

Appellant filed the original declaratory judgment complaint in this action on September 12, 1985 which, as amended to include all of the above-named defendants, contains two claims. The first claim against all the defendants arises under the Copyright Acts of 1909 and 1976 and seeks a number of declarations, including that Ms. Stone is the natural daughter of Williams, Sr., and as such is entitled to a proportionate share of the renewal rights from his songs. The second claim alleges that certain of the defendants committed a conspiracy to defraud her.

In addition to this federal action, Hank Williams, Jr. and Ms. Stone sued each other in Alabama state court in 1985, each seeking a declaratory judgment on appellant's status vis-a-vis Hank Williams, Sr. That court held that even though Ms. Stone was the natural child of Williams, Sr., she was not his heir under Alabama law. Thus, it gave preclusive effect to the prior 1967 and 1968 Alabama Circuit Court state ruling.

Appellant and defendants moved for summary judgment in the instant action on a number of grounds including statute of limitations and res judicata. The district court, in granting defendants' motion for summary judgment and dismissing her complaint, relied on the doctrine of laches and did not reach the other issues.

II DISCUSSION

Historically laches developed as an equitable defense based on the latin maxim *vigilantibus non dormientibus*

aequitas subvenit (equity aids the vigilant, not those who sleep on their rights). *See Independent Bankers Ass'n of America v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). In contrast to a statute of limitations that provides a time bar within which suit must be instituted, laches asks whether the plaintiff in asserting her rights was guilty of unreasonable delay that prejudiced the defendants. *See, e.g., Gardner v. Panama Railroad Co.*, 342 U.S. 29, 31 (1951); *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 655 (2d Cir. 1978). The answers to these questions are to be drawn from the equitable circumstances peculiar to each case.

A ruling on the applicability of laches is overturned only when it can be said to constitute an abuse of discretion. *See Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956); *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30 (1951); *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 82 (2d Cir. 1981) (per curiam). Because this is an appeal from a motion for summary judgment that dismissed appellant's complaint, we construe the record in the light most favorable to appellant. We therefore presume the correctness of the 1985 holding of the State Court of Alabama that Cathy Stone is the natural daughter of Hank Williams, Sr. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam) (inferences must be drawn in favor of nonmoving party).

We must analyze the reasonableness of delay and the resulting prejudice, *see, e.g., Czaplicki*, 351 U.S. at 533; *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980), to see whether there was a material issue of fact that should have been submitted to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A. Delay

Although laches promotes many of the same goals as a statute of limitations, the doctrine is more flexible and requires an assessment of the facts of each case – it is the reasonableness of the delay rather than the number of years that elapse which is the focus of inquiry. *See Gardner*, 342 U.S. at 31-32 (the matter should not be determined by reference to mechanical application of statute of limitations; equities of parties must be considered); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *Wagg v. Herbert*, 215 U.S. 546, 553 (1910). In holding that Ms. Stone unreasonably delayed in bringing this action to have her rights declared, the district court focused on the years 1974-85, beginning with Mrs. Deupree's conversation with appellant regarding the inheritance, and ending with the filing of the complaint that initiated the instant case.

In our view, the delay for the period from 1974 to 1980 may well have been entirely excusable under the circumstances. First, her relationship with the Deuprees is by all indications the paradigm of a successful adoption. Thus, it is not surprising that loyalty and gratitude to Mr. and Mrs. Deupree, whom she considered her real parents, gave her pause at doing anything that might hurt their feelings. For this reason, George Deupree's telephone call to Ms. Stone is significant. Only after he called in 1980 could appellant be sure that investigating her natural parentage would not damage the only family bonds she knew. Second, Ms. Stone's embarrassment at asserting her relationship to Williams, Sr. is also understandable, because his notoriety would have made publicity almost impossible for her to avoid. This is

substantiated by the extensive press coverage of the 1967 and 1968 court proceedings.

Third, only in recent years have courts and the general public come to recognize that children born of unmarried parents should not be penalized by being accorded a status for which they are not to blame. In the 1967 and 1968 proceedings, attorney Hamilton argued on Ms. Stone's behalf that discriminating against illegitimate children violated the Federal Constitution. Unfortunately for appellant, Hamilton was before his time; the case that would remove much of the stigma associated with illegitimacy was then pending before the Supreme Court, but not decided until after appellant's rights had been adjudicated. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding unconstitutional state statute that discriminated against illegitimates to discourage births out of wedlock).

But even though Ms. Stone might arguably be excused for the reasons just stated from filing suit until 1980, there is simply no plausible explanation for her delay in filing the instant complaint until September 1985, after five more years had passed. Appellant's filial loyalty is admirable, and one can sympathize with her feelings of embarrassment and trepidation attendant upon widespread personal publicity. But these reasons for delay cannot last forever for purposes of laches. A point arrives when a plaintiff must either assert her rights or lose them. Here Ms. Stone's procrastination and delay, which silently allowed time to slip away, remain as the only reason for her failure [sic] bring suit earlier.

Where plaintiff has not slept on her rights, but has been prevented from asserting them based, for example,

on justified ignorance of the facts constituting a cause of action, personal disability, or because of ongoing settlement negotiations, the delay is reasonable and the equitable defense of laches will not bar an action. *See* Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitation*, 56 B. U. L. Rev. 940, 972 (1976). There is no such reasonable excuse, or any issue of fact presented in the instant case that would permit a jury to excuse appellant's delay for the five years beginning in 1980 and ending in September 1985.

B. Prejudice

Laches is not imposed as a bar to suit simply because a plaintiff's delay is found unexcused; it must also be determined whether the defendants have been prejudiced as a result of that delay. *See Saratoga Vichy Spring Co.*, 625 F.2d at 1040. Although an evaluation of prejudice is another subject of focus in laches analysis, it is integrally related to the inquiry regarding delay. Where there is no excuse for delay, as here, defendants need show little prejudice; a weak excuse for delay may, on the other hand, suffice to defeat a laches defense if no prejudice has been shown. *See Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963). Defendants may be prejudiced in several different ways. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982). One form of prejudice is the decreased ability of the defendants to vindicate themselves that results from the death of witnesses or on account of fading memories or stale evidence. Another type of prejudice operates on the principle that it would be inequitable in light of some change in defendant's position to permit plaintiff's claim

to be enforced *See Holmberg*, 327 U.S. at 396. Defendants here were prejudiced in both ways.

As the district court noted, some of the key people having knowledge of the events preceding Ms. Stone's birth have died since 1974 – George Deupree, Bobbie Jett and Billie Jean Williams Berlin [sic]. All of their deaths are not equally prejudicial. For example, Bobbie Jett died in 1974, so absence of her testimony cannot be found to prejudice defendants because she would not have been alive to testify even if appellant had filed suit immediately. Nevertheless, the circumstances giving rise to this appeal have already spanned over two decades and the additional five years of Ms. Stone's unexcused delay doubtless would hamper the defense further – appellant's deposition reveals that even her memory has faded significantly in the interim. *See Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 83 (2d Cir. 1981). We conclude that the defendants were prejudiced to some degree by evidence that was lost by death or weakened during the delay. Because the defendants were injured in other ways by the delay, we need not hold that a finding of this kind of prejudice is alone sufficient to support the laches defense.

Prejudice may also be found if, during the period of delay, the circumstances or relationships between the parties have changed so that it would be unfair to let the suit go forward. The defendants have entered into numerous transactions involving Williams, Sr.'s songs. Ms. Stone responds that these transactions need not be unravelled – she could simply share in the profits. But that argument ignores the fact that the transactions were premised on the apparent certainty of the ownership of the songs' renewal rights – attributable to appellant's delay. This

procrastination prejudiced defendants by lulling them into a false sense of security that the renewal rights were as they appeared and that she would not contest the 1967 and 1968 court ruling. *See Independent Bankers Ass'n of America v. Heimann*, 627 F.2d at 488 (D.C.Cir. 1980); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 704 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

We cannot be sure that defendants' [sic] would have struck the bargains they did had they anticipated the diminution in their profits that Ms. Stone seeks. This result is logically not altered by whether the defendants made actual expenditures or whether they simply incurred the opportunity costs implicated in foregoing other ventures. As Judge Learned Hand wrote as a district court judge in a copyright case in which the plaintiff delayed for 16 years before filing suit, it would be unfair for a plaintiff "to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win." *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916); *see also Independent Bankers*, 627 F.2d at 488. We therefore agree with the district court that the change in relationships and circumstances that occurred while Ms. Stone delayed would prejudice the defendants if the case were allowed to proceed at this late date.

Finally, we note that the underlying value of the laches doctrine, as with statutes of limitations, is that of repose. Even assuming that appellant's claims are meritorious, the availability of the laches defense represents a

conclusion that the societal interest in a correct decision can be outweighed by the disruption its tardy filing would cause. Thus, courts, parties and witnesses "ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *See Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965).

III CONCLUSION

We hold therefore that Ms. Stone's delay in filing suit until September 1985 was unexcused and has prejudiced defendants. Accordingly, the order of the district court is affirmed.

APPENDIX C-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

CATHY YVONNE STONE,

Plaintiff,

-against-

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Defendants.

85 Civ. 7133 (JFK)

OPINION and ORDER

- X

APPEARANCES:

For Plaintiff:
James A. Goodman, Esq.
Rudin, Richman & Appel
Beverly Hills, CA
Of Counsel: Marjorie Smith, Esq.
Coblence & Warner
New York, NY

F. Keith Adkinson, Esq.
Washington, D.C.

For Defendants Hank Williams, Jr.,
Wesley H. Rose, Roy Acuff,
Fred Rose Music, Inc. and
Milene Music, Inc.:
Alan L. Shulman, Esq.
Silverman, Shulman & Slotnick, P.C.
New York, NY

For Defendants Acuff-Rose Opryland Music, Inc.
and Milene-Opryland Music, Inc.:
Lawrence I. Fox, Esq.
Berger & Steingut
New York, NY

For Defendants Billie Jean Williams Berlin, Chappell
Music Company and Aberbach Enterprises, Ltd.:
Thomas R. Levy, Esq.
New York, NY

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Background

Plaintiff, born on January 6, 1953, brings this action concerning her allegation that she is the illegitimate daughter of the late country and western singer Hank Williams, Sr. ("Hank") and is entitled to a share of the royalties derived from Hank's compositions ("the Works").

Plaintiff has sued ten defendants: Hank Williams, Jr., the legitimate son of Hank and Audrey Mae Williams; Billie Jean Williams Berlin, who was married to Hank

when he died on January 1, 1953; Aberbach Enterprises, Ltd., the owner of the copyright renewal rights in the Works that previously had been held by Berlin and were transferred to Aberbach pursuant to a May 28, 1969 agreement; Chappell Music Company, an entity that acts as an administrative agent for Aberbach in connection with the Berlin renewal interest; Acuff-Rose Opryland Music, Inc. ("ARO"), the successor in interest of both the original rights and the renewal rights in the Works held by Williams, Jr.; Milene-Opryland Music, Inc. ("MOM"), an additional successor in interest in the original rights and the renewal rights in the Works held by Williams, Jr.; Fred Rose Music, Inc. ("FRMI"), a corporation that, in 1963, obtained the renewal rights held by Williams, Jr. and was liquidated on May 29, 1985; Milene Music, Inc., a corporation that, in 1963, also obtained the renewal rights held by Williams, Jr. and was liquidated on May 29, 1985; and Roy Acuff and Wesley H. Rose, Trustees in Liquidation for FRMI and Milene Music.

The Third Amended Complaint alleges two causes of action. First, the complaint avers that plaintiff is Hank's illegitimate daughter, and as such is a "child" entitled to one-third of the rights, and interests in and derived from, the Works pursuant to the United States Copyright Act of 1976. Second, plaintiff contends that defendants ARO, MOM, Rose, Acuff, FRMI and Milene and certain non-parties engaged in a conspiracy that lasted over fifteen years. The goal of this alleged scheme was to prevent plaintiff from perfecting her copyright interest in the Works so that the defendants would have the sole financial benefit of the copyrights. The defendants purportedly achieved this goal by withholding from plaintiff and the

Alabama state courts information about her identity and by arranging for the appointment of Drayton Hamilton as guardian ad litem for plaintiff during legal proceedings held in 1967-1968. In addition, the scheme allegedly included a 1963 agreement made by Williams, Jr., through his guardian, with FRMI and Milene providing for Williams, Jr. to transfer his rights in the Works.

Currently pending before the Court are three motions. The defendants have jointly moved for summary judgment asserting, *inter alia*, that the claims are barred by the copyright statute of limitations, laches, equitable estoppel, res judicata, collateral estoppel, and the terms of the 1976 Copyright Act. Plaintiff has cross-moved for partial summary judgment on her claim that she is Hank's natural daughter and that she is entitled to an undivided one-third interest in all renewal rights in the Works. Defendant Berlin, Chappell Music and Aberbach Enterprises have moved for partial summary judgment on the ground that if plaintiff were to prevail on her first cause of action, Berlin is entitled to a one-half interest in the Works and Hank's children are entitled jointly to a one-half interest.

For the reasons set forth below, the Court grants the defendants' motion for summary judgment and the complaint is dismissed in its entirety. The Court, therefore, does not reach the questions raised in either plaintiff's partial summary judgment motion or in the partial summary judgment motion made by defendants Berlin, Chappell Music and Aberbach Enterprises.

Facts

For the purposes of defendants' summary judgment motion, the Court assumes that Hank is plaintiff's natural father. Her natural mother is Bobbie Jett. Plaintiff was conceived in approximately April, 1952. Although Hank allegedly wanted to raise the child, his desires did not extend to marrying the child's mother, Bobbie Jett. This intention was made unmistakably clear on October 18, 1952, when Hank married defendant Berlin. However, Hank entered a contract with Jett three days prior to marrying Berlin. The agreement addressed custody issues and called for him to bear various financial responsibilities in connection with the birth of Jett's child. The contract also stated that paternity was in doubt and not admitted by the agreement. On January 1, 1953, Hank Williams, Sr. died at 29 years of age. Less than one week later, on January 6, 1953, Bobbie Jett gave birth to plaintiff.

After Jett left the hospital, the baby was left in the care of Lillian Stone and Marie Harvell, Hank's mother and cousin respectively. On December 23, 1954, a final decree of adoption was entered by the Montgomery County, Alabama, Department of Public Welfare giving Mrs. Stone the child. Irene Smith, Hank's sister, promised to care for the child in the event something happened to Mrs. Stone. Sadly, Mrs. Stone died on February 26, 1955 and Smith broke her pledge. Plaintiff was made a ward of the State of Alabama on April 29, 1955 and remained a ward of the state until February 21, 1956. On that date, an interlocutory order of adoption was entered giving custody to the Deupree family. On April 23, 1959, a final decree of adoption was entered.

While plaintiff was being raised by the Deuprees and living her early life, events concerning Hank's estate and other collateral issues continued to unfold. Plaintiff was awarded $2,000 as her homestead interest in Mrs. Stone's residence after Mrs. Stone died. This money was placed in an interest-bearing account with the Circuit Court of Montgomery County, Alabama, to be held for plaintiff until she turned twenty-one years old on January 6, 1974. As will be described below, plaintiff only became aware of this bequest in approximately December, 1973. In 1963, the guardian of Wiiliams [sic], Jr. petitioned the Circuit Court of Montgomery County, Alabama, for permission to sell Williams, Jr.'s rights in the renewal term copyrights in the Works to FRMI. The court granted the request and an agreement was entered on March 20, 1963.

This agreement resulted in litigation taking place during 1967 and 1968 in the Circuit Court. The action attempted to determine all rights in the Works and involved Williams, Jr.'s petition to vacate the 1963 agreement. Thus, an inquiry was made into the existence of any unknown heirs to the estate. Drayton N. Hamilton, a Montgomery attorney who had previously been appointed as plaintiff's guardian ad litem in connection with Lillian Stone's estate, was named guardian ad litem by the Circuit Court to represent any minors who might have an interest in Hank's estate. After conducting an investigation, Hamilton told the court that plaintiff was the only potential additional heir. Hamilton contacted the Deuprees through the Alabama Department of Pensions and Security ("Alabama P & S") and advised them of the 1967-1968 proceedings. Mr. and Mrs. Deupree came to

Montgomery and apparently had a meeting with Hamilton. Hamilton was told not to pursue any claim on behalf of plaintiff. Despite this request, Hamilton continued to press vigorously the rights of plaintiff as Hank's natural daughter. During his activities, Hamilton obtained a copy of the 1952 contract between Hank and Jett which was introduced as evidence in the Circuit Court. After conducting evidentiary hearings which were widely reported in the Alabama press, the Circuit Court ruled that plaintiff was not an heir entitled to any inheritance from Hank's estate. Hamilton then unsuccessfully sought leave to appeal the court's rulings, despite the wishes of the Deuprees.

The matter remained closed until approximately the end of 1973. By this time, plaintiff was a college student at the University of Alabama. The Deuprees went to Tuscaloosa to visit plaintiff at college during either the end of December, 1973 or the early part of January 1974. Since plaintiff was on the verge of turning twenty-one years old, the issue of Lillian Stone's estate needed to be addressed. At one point during the visit of her adoptive parents, plaintiff went to the Deuprees' hotel room. Although the accounts of plaintiff and Mrs. Deupree differ slightly, the following is undisputed. Mrs. Deupree told plaintiff that Hank Williams, Sr. either was, or could be, her biological father, and that after her twenty-first birthday plaintiff had to go to the Montgomery courthouse to pick up an inheritance from the estate of Lillian Stone. Soon thereafter, plaintiff went to Montgomery and was accompanied by an uncle, Stanley Fountain, who was a United States Marshal. Her conversation with Mrs. Deupree and her trip to Montgomery prompted plaintiff to

visit a library in Tuscaloosa to research Hank's life. Plaintiff read a book by Roger Williams entitled *Sing a Sad Song* which chronicled Hank's life. The book contained a passage concerning a child born to a brunette from Tennessee. The child, according to the book, was cared for by Lillian Stone until the child was adopted. After her discussion with Mrs. Deupree and the receipt of a $3,800 inheritance from the Stone estate, plaintiff thought that this child might have been herself when she read the book in early 1974. Plaintiff, who claims Mrs. Deupree told her that there was no proof showing Hank to be her natural father and that everything had already been decided against plaintiff, then chose not to pursue the matter further.

Another significant event occurred during 1976. Plaintiff told Nicholas Braswell, a Montgomery attorney who was married to one of plaintiff's college sorority sisters, that she was adopted and might be the biological daughter of Hank Williams, Sr. Braswell was familiar with Judge Richard Emmett [sic] who had presided over the 1967-1968 Circuit Court proceedings. Braswell told plaintiff that Judge Emmett [sic] had a tremendous interest in Hank and had memorabilia from Hank's career all over his office. Braswell asked plaintiff if she objected to his calling up Judge Emmett [sic] and passing along her claim; plaintiff told Braswell to call Judge Emmett [sic]. After Braswell spoke with the judge, he again spoke with plaintiff, telling her that Judge Emmett [sic] would like to meet her. Plaintiff, however, never tried to contact the judge while he was in Montgomery. At some point, Judge

Emmett [sic] moved from Montgomery, Alabama, to California. Although plaintiff learned about this relocation in the newspapers, she never attempted to find out where in California Judge Emmett [sic] moved to, and never attempted to contact him.

In December, 1980, plaintiff received a telephone call from Mr. Deupree. During the conversation, Deupree told plaintiff that he had made certain decisions in the 1960's which he had come to regret. Presumably, these decisions concerned the 1967-1968 proceedings in the Circuit Court. Deupree stated that if plaintiff wanted to discover whether Hank was her biological father, he would help in any way possible. Deupree evidently had this change of heart after watching Williams, Jr. give an interview on a television program. Deupree told plaintiff that he would send her some newspaper articles and the names of certain individuals with whom he had been in contact during the 1960's.

At this point, plaintiff attempted to discover what her file with the Alabama P & S contained. Although plaintiff could not obtain access to her file, she does not recall the reasons given by the Alabama P & S. She then told the Alabama P & S that she wanted to contact her natural mother. As a result, the department wrote a letter to Willard Jett, Bobbie Jett's uncle. During 1981, plaintiff once again read books and newspaper articles on Hank. Yet, it was in 1981 that she read an article that referred to Hank's cousin, Marie Harvell. She had previously spoken with Charles Carr, Hank's chauffeur, a name she uncovered by reading a book. Carr told plaintiff about the existence of Harvell. During 1981, plaintiff visited Harvell. Upon seeing a birth mark on plaintiff's arm, Harvell

began to cry, evidently believing that plaintiff was Hank's daughter. Plaintiff made subsequent visits to the Harvell home and discussed Hank, Bobbie and their relationship. Harvell also gave plaintiff Willard Jett's name. Plaintiff telephoned Willard, who resided in Nashville, and was told that Bobbie had died. Plaintiff had additional telephone conversations with Willard and had meetings with his wife. Later in 1981, plaintiff travelled to Nashville and met other members of the Jett family. In addition, plaintiff went to see the Cooks, a family that cared for plaintiff after the death of Mrs. Stone and prior to her adoption by the Deuprees. In October, 1981, plaintiff travelled to California to gather more information about Bobbie Jett; plaintiff made no attempt to locate Judge Emmett [sic] during this trip.

Plaintiff's investigation also brought her to Drayton Hamilton and another lawyer, Joseph Matranga. Plaintiff went with Hamilton to the Montgomery courthouse to examine records pertaining to the 1967-1968 proceeding. Mr. Deupree retained Matranga to assist with the investigation and Matranga recommended to plaintiff that she solicit Hamilton's assistance in locating pertinent documents. Hamilton stated that he would send material to Matranga. Despite being in contact with Hamilton and seeing a large box of documents in 1981, it was not until 1984 that plaintiff asked Matranga for the documents he had received from Hamilton. In September, 1984, plaintiff met F. Keith Adkinson, an attorney who she subsequently married. On September 12, 1985, plaintiff brought this lawsuit.

Over the past twenty years, other events touching on this case have also transpired. Since January 1, 1974,

Bobbie Jett, Audrey Mae Williams and George Deupree have all died. In addition, Robert Stewart, who drafted the 1952 contract between Hank and Bobbie, and represented Hank and members of his family and the estate, died in the intervening years. Various financial transactions have been completed during the past twenty years. FRMI and Milene paid royalties from the Works to Hank's estate, Williams, Jr. and Audrey Mae Williams. Pursuant to the 1963 agreement, FRMI, Milene, ARO and MOM have all paid royalties to Williams, Jr. based on the Works' renewal term rights. Consequently, Williams, Jr. has reported these royalties on his personal income taxes over the years. After the payment of royalties for the period ending June 30, 1985, ARO and MOM have withheld from Williams, Jr. payments of royalties arising out of the renewal term rights pursuant to an assignment. ARO and MOM, as well as FRMI and Milene, reported on their tax returns those royalty sums not paid to Williams, Jr., Audrey Mae Williams or the estate. In addition, these entities executed licenses and contracts for the exploitation of the Works. When FRMI and Milene were liquidated, the Trustees sold the copyrights that the companies held, warranted their good title and pledged to indemnify the purchaser for any breach of the warranties. Berlin, Chappell and Aberbach have also received royalties based on Berlin's interest in the renewal term rights. Each has reported these royalties on their respective income taxes.

DISCUSSION

The parties in this hotly contested action have thoroughly briefed several areas including the 1976

Copyright Act, the statute of limitations, res judicata and collateral estoppel. However, this entire controversy turns on a basic and time honored principle: "Equity aids the vigilant, not those who slumber on their rights." *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, 56 F.2d 973, 975 (10th Cir. 1932).

The doctrine of laches serves as a complete bar to a plaintiff's claims if the defendants demonstrate an unreasonable and inexcusable delay by plaintiff in bringing the lawsuit and that the delay resulted in undue prejudice suffered by the defendants. *Dalsis v. Hills*, 424 F. Supp. 784, 788 (W.D.N.Y. 1976). Laches requires a balancing of the equities between the parties. *Potash Co. v. International Minerals & Chemical Corp.*, 213 F.2d 153, 156 (10th Cir. 1954). Therefore, the longer a plaintiff unjustifiably delays in asserting a claim, the lesser the showing of prejudice that will be required of the defendant. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). The laches calender clearly does not turn its pages when an individual is justifiably ignorant of the facts giving rise to a claim. *Potash Co.*, 213 F.2d at 155. However, a plaintiff cannot look away from facts that could support a claim, and then later – in this case, many years later – begin to act on those facts and obtain judicial relief. Thus, the clock begins to tick when plaintiff has either actual or constructive notice of facts supporting a cause of action. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F. Supp. 399, 402 (E.D. Wis. 1984); *Anaconda Co. v. Metric Tool & Die Co.*, 485 F. Supp. 410, 427 (E.D. Pa. 1980). As the Supreme Court noted nearly a century ago,

> [t]he defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.

Foster v. Mansfield, Coldwater and Lake Michigan Railroad Co., 146 U.S. 88, 99 (1892).

An analysis of plaintiff's conduct demonstrates that she ignored facts as early as 1974 that alerted her to the strong possibility that Hank Williams, Sr. was her biological father. Indeed, a cynic might suggest that plaintiff slumbered peacefully, and knowingly, on her rights until she was awakened by the attractive sound of a ringing cash register.

As plaintiff reached twenty-one years of age in January, 1974, she was told, at a minimum, that she could be the biological daughter of one of the most successful country and western singers of all time, Hank Williams, Sr. Soon thereafter, she went to the courthouse in Montgomery to pick up an inheritance of over $3,000 from the estate of a woman who plaintiff could have readily discovered to be Hank's mother. Plaintiff testified that this amount was a significant figure to her when she went to the courthouse at age twenty-one. Despite the fact that she was an adult at the time, plaintiff was accompanied to court by her uncle, a federal marshal, because of the Deuprees' concern that news reporters would be present.

At this point, a reasonable person would clearly be on notice that Hank was suspected to be plaintiff's biological father. In fact, plaintiff herself entertained this thought. After receiving her inheritance, she went to a library and read a biography of Hank, *Sing a Sad Song*, written by Roger Williams. Plaintiff believed that she might have been the subject of a passage describing Hank's illegitimate daughter born in 1953. However, she did nothing to pursue the issue other than to ask the Deuprees certain questions, the subject matter of which she does not remember. Plaintiff, an adult, accepted the statements of the Deuprees that there was no proof of Hank's parentage and that "it had all been decided." Moreover, in 1976 plaintiff learned that Judge Richard Emmett [sic] was a long time Hank Williams buff. Plaintiff permitted the judge to be told of her claim that she might be Hank's illegitimate daughter, but opted not to see him after learning of the judge's desire for a meeting. Indeed, once the judge moved to California, she did not attempt to locate him.

The fact that plaintiff made a calculated decision not to pursue her biological link to Hank during the 1970's is made irrefutable by her deposition testimony. At her deposition on November 5, 1986, plaintiff testified as follows:

> Q. Do you recall ever having the feeling that you did not want anyone to know that you may be the daughter of Hank Williams or believed yourself to be the daughter of Hank Williams?
>
> . . . .
>
> A. Yes, sir.

Shulman Aff., Ex. 2 at 332-33.

Q. Is there any reason to think that it's not true? That those were your feelings between the period of January or December '73 or January '74 through 10/17/79?

A. No, sir.

Id. at 333.

Q. Let's try to put this in prospective [sic]. We've already discussed one time in your life that you didn't want to be linked with Hank Williams; is that right?

A. Yes, sir.

Q. But you don't have a specific knowledge as to the beginning and ending period of that feeling; is that correct?

A. That's correct.

Q. Based upon this testimony and your prior testimony, you had that feeling, did you not, between, at least December '73 and 10/17/79?

. . . .

Q. Based upon this information and your prior testimony?

A. Yes, sir.

Q. It's your statement that you did not want to be identified in any way with Hank Williams between December '71 [sic] and 10/17/79 in any way, correct?

. . . .

A. That's correct.

Id. at 342-43.

As a result of her desire not to be connected with Hank, plaintiff did not attempt to contact any individual who had personal knowledge of plaintiff's parentage. Plaintiff never attempted to contact any relative of either Hank or Bobbie Jett, any of Hank's personal or professional acquaintances, Robert Stewart, the attorney for Hank's estate, author Roger Williams, or any member of the press with knowledge of the 1967-1968 proceedings. For whatever reason, plaintiff did not seriously look into her link with Hank until 1981. It is beyond dispute that plaintiff engaged in an unreasonable and inexcusable delay in bringing her claim.

The Court now turns to whether plaintiff's delay resulted in undue prejudice to the defendants. The types of prejudice that support the defense of laches include " 'the loss of evidence that would support the defendant's position,' " or the defendant having changed his position in a manner that would not have occurred if the plaintiff had acted promptly. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 n.17 (8th Cir. 1979) (quoting *Tobacco Workers International Union Local 317 v. Lorillard Corp.*, 448 F.2d 949, 958 (4th Cir. 1971)), *cert. denied*, 446 U.S. 913 (1980). Prejudice may also be found where a defendant has acted in reliance on the "false sense of security" that he was lulled into by the plaintiff's delay. *See Independent Bankers Assoc. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam); *Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc.*, 560 F.2d 1325, 1334 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F.2d 686, 704 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

The prejudice suffered by the defendants in this case is profound. Obviously, their first line of defense to plaintiff's claim is that she is not Hank's biological daughter. However, the events leading up to her birth took place in 1952. Thus, even if plaintiff proceeded promptly during the middle to late 1970's, the defendants would confront the obstacles of fading memories and lost proof. This problem is grossly exacerbated by plaintiff's decision to forgo pursuing a connection with Hank's legacy during the 1970's, only to turn around in the 1980's and stake a claim to his estate. As noted earlier, in the years since plaintiff first knew of her possible relationship with Hank, individuals with personal knowledge of relevant events have died. In the forefront of these individuals is Bobbie Jett, who died in California during 1974. Her testimony, either in person or preserved in a deposition, would be most important evidence in the case. Moreover, those individuals who would be available to testify have recollections of the pertinent events that have faded and become less reliable over time. This fact is very clear when one reads the depositions submitted by plaintiff in support of her motion for partial summary judgment.

The defendants have also suffered undue prejudice in that they have entered financial and business transactions during the period of plaintiff's inertia based on the belief that Hank Williams, Jr. was Hank's only child. FRMI, Milene and their trustees made warranties on the copyrights when they sold their interest. ARO and MOM purchased the assets of FRMI and Milene, and the relevant copyrights, before learning of plaintiff's allegations. Moreover, all of the defendants who realized income

derived from the exploitation of the copyrights paid income taxes based on those proceeds. These defendants now face a situation where, if plaintiff prevailed, they would lose the money paid in taxes that was based on a share of the copyright royalties that was above the accurate amount, or face the daunting and costly task of seeking to recover these monies from the federal treasury.

It is important to note that the event which spurred plaintiff to action in December, 1981 was a conversation with Mr. Deupree that lacked any startling new revelation. He merely told her that she could be Hank's daughter, that he regretted certain actions he had taken during the 1960's and that he would assist plaintiff in discovering whether Hank was her biological father. After the conversation, Mr. Deupree sent plaintiff some articles and certain names, but did not provide plaintiff with materials that would not have been available to her had she diligently pursued the issue in the mid-1970's.

Laches is not a doctrine concerned merely with the passage of time. Rather, laches also addresses the changes in conditions and relationships which are intertwined with the lawsuit over that passage of time. *See Galliher v. Cadwell*, 145 U.S. 368, 373 (1892); *Lingenfelter v. Keystone Consolidated Industries, Inc.*, 691 F.2d 339, 340 (7th Cir. 1982) (per curiam). Many transactions have taken place, human memories have faded and several key people have died since plaintiff first knew that Hank Williams, Sr. might be her father. Plaintiff was an adult and made a conscious choice during the 1970's; it would be unfair to the defendants to permit plaintiff to reap the benefits of her recent change of heart.

CONCLUSION

The defendant's motion for summary judgment is granted and the complaint is hereby dismissed. The case is to be removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
September 6, 1988

/s/ John F. Keenan
JOHN F. KEENAN
U.S.D.J.

APPENDIX D-1

SUPREME COURT OF THE UNITED STATES

No.
A-518

Hank Williams, Jr., et al.,

Petitioners

v.

Cathy Yvonne Stone

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 4th, 1990.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 19th
day of January, 1990.

APPENDIX E-1

88-7860

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

CATHY YVONNE STONE, an individual,

Plaintiff-Appellant,

-against-

HANK WILLIAMS, JR., BILLE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ABERBACH ENTERPRISES, LTD., a New York corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennessee corporation,

Defendants-Appellees.

From a Final Order of the United States District Court for the Southern District of New York.

JOINT APPENDIX
VOLUME I [pp. 1a-500a]

Rudin & Appel
9601 Wilshire Boulevard
Beverly Hills, California 90210
(213) 274-4844
-and-

Coblence Warner Hamilton & Smith
1370 Avenue of the Americas

New York, New York 10019
(212) 957-9700

Attorneys for Plaintiff-Appellant
Cathy Yvonne Stone

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APPENDIX E-2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

PETITION FOR REHEARING

RUDIN AND APPEL
A Professional
Corporation
9601 Wilshire Blvd.,
Suite 800
Beverly Hills, Calif.
90210
(213) 274-4844

OF COUNSEL:
MILTON A. RUDIN
JOSEPH L. GOLDEN

COBLENCE WARNER
HAMILTON & SMITH
1370 Avenue of the
Americas
New York, N.Y. 10019
(212) 957-9700

OF COUNSEL:
KENNETH E. WARNER

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DOCKET NO. 88-7860

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant Cathy Yvonne Stone presents this Petition for Rehearing in the above-entitled appeal, and

in support thereof respectfully presents the following grounds.

In an Opinion dated April 21, 1989, this Court affirmed the decision of the United States District Court for the Southern District of New York granting summary judgment in favor of appellees on the ground of laches. Judgment thereon was entered on April 21, 1989. This Petition for Rehearing is timely under Rule 40(a) of the Federal Rules of Appellate Procedure.

I

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED AND/OR MISAPPREHENDED CONTROLLING POINTS OF LAW

In affirming the District Court's decision, this Court overlooked and/or misapprehended the following points of law:

1. Renewal copyrights and the interests therein are created by Congress in section 304 of the 1976 Copyright Act, 17 U.S.C. §304. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 570 F.2d 554, 556 (6th Cir. 1978). An owner of an interest in a renewal copyright is entitled to an accounting of his/her share of the income earned from each licensing of the renewal copyright. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 223 F.2d 252 (2d Cir. 1955). A claim for breach of that duty to account does not arise until the duty is violated – *i.e.*, when the renewal copyright is licensed and the income therefrom is not properly accounted for.

In affirming the District Court's award of summary judgment as to the entire action, this Court overlooked or

misapprehended the nature of appellant's interest in the renewal copyrights. This Court's decision divests appellant of the Congressionally-created right to her share of the income to be earned from the licenses to use the renewal copyrights (a) which appellees have granted since the action was filed and (b) which will be granted during the 37-41 years remaining in the renewal copyright terms after suit was filed, simply because she waited 1-3/4 years longer than the applicable limitations period before filing suit. Laches might bar appellant from receiving her share of the income earned from licenses granted before September 12, 1982 or even September 12, 1985. But it was a misuse of the defense and a miscarriage of justice to preclude her from receiving her share of the licensing income for the next 37-41 years. *Halcon Int'l. v. Monsanto Australia, Ltd.*, 446 F.2d 156, 159 (7th Cir.), *cert. denied*, 409 U.S. 949 (1971).

2. This Court also overlooked the continuing nature of appellees' wrongful appropriation of appellant's interest in the renewal copyrights and failed to follow the well-established principle that laches precludes only the recovery of pre-filing damages but does not bar an action from proceeding as to post-filing events. *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 741 (9th Cir. 1984) [laches does not bar action, only recovery of pre-filing damages]; *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 105 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960) [delay immaterial where only prospective relief sought]; *In Re Yarn Processing Patent Validity Litig. (No. II)*, 602 F. Supp. 159, 170 (W.D.N.C. 1984) [laches bars recovery only for acts occurring prior to filing of complaint]; *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 307 (S.D. Cal. 1959),

aff'd, 281 F.2d 543 (9th Cir. 1960). *See generally*, 3 *Nimmer on Copyright*, §12.06 (1988). This rule is not limited to infringement actions. *See, e.g., Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005, n. 32 (5th Cir., Unit A, 1981).

This Court's reliance on *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916) to support its contrary result is based on a misapprehension of that case. First, the delay was not 16 years, it was approximately 13 months. 234 F. at 106. Second, all the money that was to be earned from the infringing song was earned by the defendants before the suit was brought. *Id.* Third, Judge Hand refused to give Piantadosi, the non-innocent infringer, the benefit of the rule. *Id.* at 108. Fourth, an injunction against future infringements was granted. *Id.* at 109.[1] Fifth, the result as to the innocent infringers is questionable given the three-year statute of limitations in 17 U.S.C. §507(b).

The *Haas* opinion in fact supports appellant's position on this point. All of the money to be earned from licensing the renewal copyrights has not yet been earned; over 35 years remain. Appellees are not innocent wrongdoers; they have always known of appellant's claim. Judge Hand did not bar relief as to future events because of the delay, just the recovery of pre-filing profits.

3. This Court also overlooked the point of law that the time allowed by the statute of limitations is not counted against a plaintiff in a laches analysis, for laches is no defense to an action filed within the statute of limitations. *United States v. RePass*, 688 F.2d 154, 156 (2d Cir. 1982).

---

[1] Upon rehearing, the complaint was dismissed on an unrelated ground.

The applicable limitations period began on September 12, 1983, 17 U.S.C. §507(b) and *Mount v. Book-of-the Month Club*, 555 F.2d 1108, 1111 (2d Cir 1977). Appellant was relieved of her fillial obligations by a December 1980 telephone call from her adopted father [Jt.App. 242a, Opinion at 2957-58]. Thus, the delay to be evaluated is at most 1-3/4 years (December 1980 to September 1982), not five years as this Court decided [Opinion at 2958].

II

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED AND/OR MISAPPREHENDED NUMEROUS MATERIAL FACTS

In its Opinion this Court also overlooked and/or misapprehended the following material facts:

1. The Court held that appellees were prejudiced by appellant's failure to file suit between 1980 and 1985 because "some of the key people having knowledge of the events preceding [her] birth have died since 1974 – George Deupree, Bobbi Jett and Billie Jean Williams Berlin" [Opinion at 2960]. Yet those individuals either had no first hand knowledge of the events preceding appellant's birth [Deupree], died before 1980 [Jett] or were alive when this suit was filed [Williams Berlin].[2] Moreover,

---

[2] Billie Jean Williams Berlin is still alive. If the Court meant Audrey Mae Williams rather than Billy Jean Williams Berlin, the misapprehension nevertheless remains. Audrey Mae Williams was the first wife of Williams, Sr. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420 (M.D. Tenn. 1975), *affirmed*, 570 F.2d 554 (6th Cir. 1978). They were divorced in 1952, and she died in 1975 [Jt. App. 192a, ¶80].

Mrs. Deupree, Drayton Hamilton, Judge Emmett [sic], the Alabama P & S officials with whom appellant came in contact and numerous other percipient witnesses were alive when this suit was filed (and were deposed). No material witnesses became unavailable between 1980 and 1982 (or 1985), and thus appellees did not suffer this form of prejudice because of that delay.

2. The issue as to which the deceased witnesses supposedly would have testified – whether appellant is the natural child of Hank Williams, Sr. – was irrelevant to the District Court's decision because that court assumed she was for purposes of the motion. Furthermore, the Alabama state court held in 1987 that Williams, Sr. was her natural father. Thus, no testimony material to appellant's ancestry was lost after December, 1980.

3. This Court held appellees would be prejudiced because they "entered into numerous transactions involving Williams, Sr.'s songs . . . [which] were premised on the apparent certainty of the ownership of the songs' renewal rights – attributable to appellant's delay [Opinion at 2960-61]. In reaching that conclusion this Court overlooked the following facts:

> a) Any mechanical license granted by the appellees after September 12, 1985 was granted with full knowledge of this lawsuit. Mechanical licenses are granted for a particular use, not for a term of years. The amount of the license fee in no way depends on the number of owners of the renewal copyright being licensed. It is either negotiated on a case by case basis with the licensee or set by statute. 17 U.S.C. §115. *See Recording Indus. Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 4 (D.C. Cir. 1981).

There will be hundreds, if not thousands, of such licenses granted between September 12, 1985 and the end of the various renewal copyright terms. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 158 (1985) and Rose Affidavit [Jt. App. 252a]. Each of these licenses will have been or will be granted with full knowledge of appellant's claim. Allowing appellant to proceed to trial to determine her right to share in the income earned from those licenses will not deprive appellees of the benefits of any position taken vis-á-vis these licenses in reliance on appellant's supposed inaction.

b) The assignment of Williams, Jr.'s interest in the renewal copyrights to the Acuff/Rose Interests in 1963 [Jt. App. 181a-82a] and the assignment of Williams Berlin's interest in the renewal copyrights to the Aberbach Interests in 1969 [Jt. App. 182a] were made long before 1980. Those agreements were negotiated *with full knowledge* of appellant's potential claim. Appellees sought to eliminate that potential claim by way of the 1967-1968 Alabama proceedings. Appellant's delay between 1980 and 1985 made no difference in those decisions.

c) The supposed prejudice to be suffered by Williams, Jr. and Williams Berlin by having to share the income received before September 1983 (or 1985) could be totally ameliorated by (1) denying appellant the right to share in that income, *Halcon Int'l., Inc. v. Monsanto Australia, Ltd., supra*, or (2) requiring appellant to reimburse them for the tax consequences (which is all they complain about). Prejudice which can be ameliorated so easily should not support a laches defense.

d) There is no competent evidence in the record to support the claim of prejudice by reason of the May 1985 acquisition by Acuff-Rose-

Opryland Music, Inc. ("ARO") and Milene Opryland Music, Inc. ("MOM"), of the assets of Acuff-Rose Publications, Inc., Milene Music, Inc. Fred Rose Music, Inc. and Acuff-Rose Songs, supposedly without knowledge of appellant's potential claim. The conclusory Wentworth Affidavit [Jt. App. 256a-260a] does not supply any such evidence. Rule 56(e) of the Federal Rules of Civil Procedure.

In fact, that affidavit and the Purchase Agreement [Jt. App. 624a-689a] evidences a ready means by which ARO and MOM can protect themselves from any such prejudice – by withholding payments due under the promissory notes pending a reevaluation of the value of the assets pursuant to ¶4 of the Purchase Agreement. [Jt. App. 260a, ¶17 and Jt. App. 638a-39a, ¶4]. MOM and ARO agreed upon the purchase price according to what they believe *they*, as the publisher, could earn from licensing all the copyrights they purchased (not just the copyrights at issue herein). It does not matter, logically or otherwise, to MOM or ARO how many individuals own interests in the renewal copyrights. However many there are, all will participate in the 50% writer's share[3] of the license fees ARO and MOM collect. ARO and MOM will collect their 50% publisher's share regardless.

The sellers of the copyrights, Acuff and Rose, knew of appellant's claim, participated in the 1967-1968 Alabama proceedings, and supposedly relied on the resulting court orders in making the representations and warranties they made to ARO and MOM. They would have

---

[3] That percentage is the "standard practice in the music publishing industry." *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 735 (2d Cir. 1983), *reversed sub nom. Mills Music Inc. v. Snyder, supra.*

made the same *res judicata* arguments in 1980 as they made in the court below in support of their motion. There is no support for this Court's conclusion that they were lulled into a false sense of security by appellant's failure to challenge the 1967-1968 orders earlier than she did.

"Lack of diligence, standing alone, is insufficient to support a claim of laches; the party asserting the claim also must establish that it was prejudiced by the delay." *Marjorica, S.A. v. R. H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir. 1985). This Court's determination that appellees will be prejudiced by reason of the delay from 1980 to 1985 is not supported by the evidence in the record. This Court misapprehended the facts upon which its determination of prejudice is based.

4. This Court misapprehended the nature of the "discussion" concerning the 1952 Williams, Sr.-Jett custody and support agreement that appellant had with Drayton Hamilton after 1980 [Opinion at 2955]. The only thing about the agreement "discussed" during that meeting was that the document was part of sealed court records. Appellant did not learn the contents of that agreement, and thus that Williams, Sr. had not abandoned her as she previously believed, until 1984 when Keith Adkinson obtained it and read it to her [Jt.App. 216a(¶70) and April 27, 1987 Stone Affidavit, ¶¶8 and 9]. She filed suit within a year after that.

III

CONCLUSION

For the foregoing reasons, appellant respectfully petitions for a rehearing of this appeal.

Dated: May 4, 1989

Respectfully submitted,

RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Blvd., Suite 800
Beverly Hills, California 90210

OF COUNSEL:
MILTON A. RUDIN
JOSEPH L. GOLDEN

COBLENCE WARNER
HAMILTON & SMITH
1370 Avenue of the Americas
New York, New York 10019

OF COUNSEL:
KENNETH E. WARNER

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Penthouse, Beverly Hills, California 90210:

On May 4, 1989, I served the foregoing document described as follows: PETITION FOR REHEARING on the interested parties in this action by placing two true copies thereof enclosed in three sealed envelopes with postage thereon fully prepaid in the United States Mail at Beverly Hills, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of an attorney who is a member of the bar of this Court at whose direction the service was made.

/s/ Christine H. Anderson
Christine H. Anderson

Subscribed to and sworn before me
on this 4th day of May, 1989.

/s/ Helen Montrose
Notary Public

OFFICIAL SEAL
HELEN MONTROSE
Notary Public-California
LOS ANGELES COUNTY
My Comm. Exp. Apr. 23, 1991

SERVICE LIST

Alan L. Shulman, Esq.
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street
New York, New York 10022

Lawrence I. Fox, Esq.
Berger, Steingut, Weiner,
Fox & Stern
600 Madison Avenue
New York, New York 10022

Thomas R. Levy, Esq.
300 East 42nd Street, 9th Floor
New York, New York 10017

APPENDIX E-3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United STates [sic] Court of Appeals, in and for the Second circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of May one thousand nine hundred and eighty-eight.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,
HON. LAWRENCE W. PIERCE,

88-7860

CATHY YVONNE STONE, and [sic] Individual,

Plaintiff-Appellant,

(FILED MAY 23 1989)

-V-

HANK WILLIAMS, JR. ET. AL.,

Defendants-Appellee,

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, Cathy Yvonne Stone,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX E-4

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Second Circuit Rule 27(a) governing use of this form is reprinted on reverse of Page 2 *Note requirement that supporting affidavits be attached*

CATHY YVONNE STONE

v

HANK WILLIAMS, JR., et al.

Use short title

88-7860 *Docket Number*

NOTICE OF MOTION

state type of motion

for RECALL OF MANDATE AND ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING AND REHEARING IN BANC

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

MILTON A. RUDIN, ESQ *
RUDIN and APPEL, a Professional Corporation
9601 Wilshire Boulevard, Suite 800
Beverly Hills, California 90210
(213) 274-4844

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

ALAN L. SHULMAN, ESQ. **
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street

New York, New York 1002
(212) 758-2020

Has consent of opposing counsel:

A. been sought? [ ] Yes [X] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)

Requested return date:

(See Second circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [X] Yes [ ] No

B. by firm date of argument notice? [X] Yes [ ] No

C. If Yes, enter date: February 1, 1989. Decision: April 21, 1989

Judge or agency whose order is being appealed:

Honorable John F. Keenan, S.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

* Coblence, Warner, Hamilton & Smith
1370 Avenue of the Americas
New York, N.Y. 10019 (212) 957-9700

Brief statement of the relief requested:

Appellant requests that the mandate of this Court issued on June 5, 1989, be recalled in order that Appellant be permitted to file a Petition for Rehearing and Rehearing In Banc, and that said Petition be ordered filed within fourteen (14) days after this Motion is granted.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Milton A. Rudin
Signed name must be printed beneath

Milton A. Rudin
Appearing for: *(Name of party)*

Cathy Yvonne Stone

Date

July 31, 1989

Appellant or Petitioner:

[XX] Plaintiff [ ] Defendant

Appellee or Respondent:

[ ] Plaintiff [ ] Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is

granted denied

** Lawrence I. Fox, Esq.
Berger, Steingut, Weiner, Fox & Stern
600 Madison Avenue
New York, New York 10022
(212) 980-1400

Thomas R. Levy, Esq.
300 East 42nd Street, 9th Floor
New York, New York 10017
(212) 682-6110

Previous requests for similar relief and disposition:

None. However, Appellant did file a Petition for Rehearing previously, which was denied on May 23, 1989.

Statement of the issue(s) presented by this motion:

Whether this Court should recall its mandate and grant Appellant leave to file a second petition for rehearing and rehearing in banc in light of *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir. 1989) and *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, Case No. 87-269 (Alabama Supreme Court, July 5, 1989).

Brief statement of the facts (*with page references to the moving papers*):

1. On April 21, 1989, the judgment of this Court affirming the District Court's decision was filed. On May 5, 1989, Appellant filed her Petition for Rehearing,

which was denied on May 23, 1989. On June 5, 1989, this Court's mandate issued. (Memorandum at 1-2.)

2. On July 5, 1989, the Alabama Supreme Court decided *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, Case No. 87-269. That Court held that the 1967-1968 judgments that Appellant was not an heir of Williams, Sr. had been obtained through fraud committed by Irene Smith, Robert Stewart and others, including certain of the Appellees. That court further held that Appellant is the natural daughter and an heir of Williams, Sr., and is entitled to a share of the proceeds of his estate and of the renewal copyrights commencing with August 1985 (Memorandum at 2-3).

3. On April 19, 1989, another panel of this Court decided *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 596 (2d Cir. 1989). That panel recognized and applied the general rule, not applied by this Court, that laches does not destroy the right or preclude all relief whatever in cases involving copyrights (Memorandum at 3-4).

Summary of the argument (*with page references to the moving papers*);

1. Because the mandate has issued, it must be recalled before Appellant can file a second petition for rehearing and/or a petition for rehearing in banc. Whether to recall the mandate is vested in this Court's discretion (Memorandum at 5).

2. A direct conflict now exists in this Circuit regarding the correct application of laches in copyright cases such as this, between this Court's decision and *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir. 1989) (Memorandum at 6-8).

3. A change in circumstances and conflict exists between this Court's decision and the Alabama Supreme Court's decision in *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, regarding Appellant's

rights to the renewal copyrights (Memorandum at 5-6).

4. The change in circumstances and these conflicts justify a recall of the mandate so that this Court's decision can be reconsidered in light of those recent decisions.

APPENDIX E-5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE v HANK WILLIAMS, JR., et al. *Use short title*	88-7860 **NOTICE OF MOTION** (filed Aug. 1, 1989) *state type of motion* for RECALL OF MANDATE AND ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING AND REMAINING IN BANC

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

MILTON A. RUDIN, ESQ.*
RUDIN and APPEL, a Professional Corporation
9601 Wilshire Boulevard, Suite 800
Beverly Hills, California 90210
(213) 274-4844

Has consent of opposing counsel:

A. been sought? [ ] Yes [X] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [X] Yes [ ] No

B. by firm date of argument notice? [X] Yes [ ] No

C. If Yes, enter date: February 1, 1989, Decision; Judge or agency whose order is being appealed: April 21, 1989

Honorable John F. Keenan, S.D.N.Y.

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and of attorney in charge of case)*

ALAN L. SHULMAN, ESQ. **
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street
New York, New York 10022
(212) 758-2020

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

* Coblence, Warner, Hamilton & Smith
1370 Avenue of the Americas
New York, N.Y. 10019 (212) 957-9700

Brief statement of the relief requested:

Appellant requests that the mandate of this Court issued on June 5, 1989, be recalled in order that Appellant be permitted to file a Petition for Rehearing and Rehearing

In Banc, and that said Petition be ordered filed within fourteen (14) days after this Motion is granted.

Complete Page 2 of This Form

By: *(Signature of attorney)* Appearing for: *(Name of party)*

/s/ Milton A. Rudin — Cathy Yvonne Stone

Appellant or Petitioner:
[X] Plaintiff

Signed name must be printed beneath — Date

Milton A. Rudin — July 31, 1989

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted and the mandate of this Court issued June 5, 1989 is recalled. Appellant should file a brief not to exceed 10 pages within 14 days of the date of this order and the appellee may file an opposing brief not to exceed 10 pages within 7 days thereafter. The issue to be briefed should be confined to the issue of how the Alabama Court's finding of fraud affects our determination regarding Stone's laches.

No oral argument is granted.

Ellsworth Van Graafeiland
Richard J. Cardamone
Lawrence W. Pierce
Circuit Judge

Date

** Lawrence I. Fox, Esq.
Berger, Steingut, Weiner, Fox & Stern
600 Madison Avenue
New York, New York 10022
(212) 980-1400

Thomas R. Levy Esq.
300 East 42nd Street 9th Floor
New York, New York 10017
(212) 682-6110

(filed Aug 24, 1989)

APPENDIX E-6
88-7860

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE AND ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

RUDIN AND APPEL
A Professional
Corporation
9601 Wilshire Blvd.,
Suite 800
Beverly Hills, Calif.
90210
(213) 274-4844

OF COUNSEL:
MILTON A. RUDIN
JOSEPH I. GOLDEN

COBLENCE WARNER
HAMILTON & SMITH
1370 Avenue of the Americas
New York, N.Y. 10019
(212) 957-9700

OF COUNSEL:
KENNETH E. WARNER

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Pursuant to Fed.R.App.P. 40 and this Court's August 24, 1989 Order, Appellant submits this Petition for Rehearing. For the reasons set forth in Section II, Appellant respectfully suggests that the rehearing be held in banc.

I. THE ALABAMA SUPREME COURT'S FINDING OF FRAUD DEFEATS THE LACHES DEFENSE

There was no finding of fraud in connection with the 1967-1968 Alabama proceedings when this Court rendered its decision. Summary judgment had been entered against Appellant on that claim by the Alabama trial court. Thus this Court was not called upon to decide whether that fraud excused Appellant's delay or otherwise defeated the laches defense. The Alabama Supreme Court's finding that legal fraud was committed by Robert Stewart, Irene Smith "and others" (including Appellees) and that therefore, the 1967-1968 orders should be set aside, requires this Court to address that issue, vacate its initial decision and reverse the District Court's summary judgment.

The Alabama Supreme Court has held that Stewart, Smith "and others" concealed (1) the "clear and convincing" evidence of Appellant's paternity; (2) Stewart's belief, shared by Acuff/Rose, that Appellant was entitled to a share of the Williams, Sr. estate and of the renewal copyrights; and (3) that between 1969 and 1975, Stewart set aside a portion of the estate income in case Appellant asserted a claim. [Alabama Opinion at 6-8, 10-20 and 22-24.] The court records, including the 1952 custody/support agreement which the Alabama Court opined might have sufficed to legitimate Appellant [Id., at 31,

n.19], were sealed so that the information contained therein, just like the sealed adoption records, would remain secret forever.

The "others" include Appellees Williams, Jr., Rose and, as their assignees or successors, the "Acuff/Rose Interests". Stewart's 1962 correspondence on behalf of Irene Smith, Williams, Jr.'s guardian, during which he recognized Appellant's rights and suggested ways to terminate them, was with counsel for Rose [Opinion at 16-17]. When Irene Smith concealed the evidence of paternity, she did so as Williams, Jr.'s guardian and administratrix of the estate [*Id.* at 23-24]. When, during his testimony in the 1967-1968 proceedings, Stewart concealed what he knew about Appellant, her potential rights and his efforts to cut them off, he was the attorney for Smith and the estate [*Id.* at 12, 20, 22]. When Stewart withheld Appellant's share of the estate income, he so advised counsel for Williams, Jr. [*Id.* at 19]. He also advised Williams, Jr.'s counsel in 1974 that Appellant had picked up her homestead allowance and warned that "further trouble may ensue" [*Id.*]. Williams, Jr. never disavowed Stewart's actions and went along with the concealment.

Even if one assumes he was not actively involved in the fraud, Williams, Jr. is charged with Stewart's (and Smith's) fraud by virtue of his relationship with them. Stewart was representing Williams, Jr. (by way of Smith) when he conspired with Acuff/Rose's counsel. After Williams, Jr. was represented by other counsel, Stewart plotted with that counsel as he had with Acuff/Rose's counsel. Under Alabama law, "[i]t is elementary that omissions and commissions of an attorney at law are to

be regarded as acts of the client whom he represents." *Lawrence v. Gayle*, 312 So.2d 385, 387 (Ala. 1975). As Acuff/Rose's principal with respect to the renewals, Williams, Jr. is charged with their conduct as well. *Arkel Land Co. v. Cagle*, 445 So.2d 858, 862 (Ala. 1983) [agent's (attorney) misrepresentation imputed to principal (client)].

The Acuff/Rose Interests also must be charged with the fraud because they conspired with Stewart and Smith. [Opinion at 16-17]. Under Alabama law, a co-conspirator is liable for the acts of each of the other co-conspirators and is liable to anyone injured by those acts. *Stokely v. State*, 49 So.2d 284, 291 (Ala. 1950). To the extent Tennessee law might apply, the result is the same. *Hardwin v. Caldwell*, 695 S.W.2d 189 (Tenn. Ct. App. 1985).

The reason for the concealment is obvious. Had Appellant's renewal rights been recognized in 1968, she would have been entitled to publish the songs through a publisher of her own choosing. Acuff/Rose no longer would be the only authorized publisher and its substantial income from that catalogue would be cut in half. Williams, Jr.'s writer's share of the income also would be cut in half. Lest there be any doubt about their motives, one need only note how vigorously these Appellees fought the Aberbach Interests' claim for six years. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420 (M.D. Tenn. 1975), *aff'd*, 570 F.2d 554 (6th Cir. 1978).

Berlin and the Aberbach Interests joined the conspiracy in 1973 when they learned of the custody/support agreement and agreed to conceal it's [sic] contents. [Opening Brief at 33-34]. Their reason for doing so was the same as Acuff/Rose's – to avoid sharing the income

with Appellant. Those who join a conspiracy are liable for all the acts in furtherance of the conspiracy, even those which occurred before they joined. *Killough v. State*, 438 So.2d 311 (Ala. Cr. App. 1982); *State v. Lequire*, 634 S.W.2d 608 (Tenn. Cr. App. 1981). Appellees conspired to deprive Appellant of her renewal rights even though they owed a fiduciary duty to her and held her share of the income in trust for her. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified*, 223 F.2d 252 (2d Cir. 1955).

This Court, like the Alabama Supreme Court, should refuse to reward Appellees' unconscionable conduct and reject their laches defense. As stated in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946):

> "If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct by the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense . . . ." 327 U.S. at 396-97.

In *McIntire v. Pryor*, 173 U.S. 38 (1899), the Supreme Court rejected a laches defense because the defendant had engaged in fraud which was as calculated and flagrant as found by the Alabama Court, stating:

> "in case of actual fraud, a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim [and] where the fraud is clearly proven, the court will look with much more indulgence upon any disability

> under which the plaintiff may labor, as excusing his delay." 173 U.S. at 54, 59.

Had there been no fraud, the 1967-1968 rulings probably would have been different [Opinion at 24]. Appellant (and her adoptive parents) would have known Williams, Sr. had not abandoned her, that upon his death she was adopted by his mother, and that she had been placed for adoption by Smith for the latter's selfish motives.[1] Knowing of Williams, Jr.'s [sic] desires and Mrs. Stone's treating her as one of the family would have made Appellant and the Deuprees think very differently about pursuing her ancestry in 1967. At the very least, these issues must be tried.

Even if Appellees' fraud does not excuse Appellant's delay, it defeats the laches defense under the unclean hands doctrine. This doctrine is as strongly rooted in societal interests and public policy as is laches. As stated in *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945):

> "That doctrine is rooted in the historical concept of [a] court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.' . . . Thus while 'equity does not demand that its suitors shall have led blameless lives,' . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

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[1] Smith's selfish motives extended to defeating Appellant's attempt to inherit under Mrs. Stone's will. *Hamilton v. Smith*, 86 So.2d 283 (Ala. 1956).

> " . . . Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor." 324 U.S. at 814-15.

A defendant's unclean hands defeats its laches defense. *Bott v. Four Star Corp.*, 807 F.2d 1567, 1576 (Fed. Cir. 1986); *TWM Mfg. Co. v. Dura Corp.*, 592 F.2d 346, 349 (6th Cir. 1979), *aff'd. after remand*, 722 F.2d 1261, 1268 (6th Cir. 1983); *National Circle Daughters of Isabella v. National Order of Daughters of Isabella, 270 F. 723, 732-34 (2d Cir. 1920), cert. denied*, 255 U.S. 571 (1921); *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916). Appellees' fraud constitutes unclean hands and defeats their laches defense.

The defense should also fail because Appellees cannot establish any prejudice other than circumstances which their fraud produced. Had there been full disclosure in 1967 and 1968, the issues would have been adjudicated while the witnesses whose deaths this Court identified as a form of prejudice (873 F.2d at 625) were still alive. The "circumstances giving rise to this appeal [would not] have spanned over two decades" (*Id.*) without a resolution. To the extent there is support for the Court's conjecture that witness recollections had faded during 1981-1985 (*Id.*), those recollections undoubtedly would have been more vivid in 1968. To the extent Appellees entered into transactions "premised on the apparent certainty" of their ownership of the renewal rights by reason of the 1967-1968 rulings (*Id.* at 625-26),[2] that

---

[2] Appellant disputes this assumption. *See*, Petition for Rehearing at 6-10. There is no danger that innocent third parties

(Continued on following page)

apparent certainty was the product of calculated fraud. Appellees should not be able to claim prejudice from circumstances they created. *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 843-44 (2d Cir. 1975); *National Circle, Daughters of Isabella v. National Order, Daughters of Isabella, supra*, 270 F. at 734.

Appellees had no reasonable basis to assume Appellant believed her renewal rights were worthless or had abandoned them, *Galliher v. Cadwell*, 146 U.S. 368, 372 (1892), for they had obtained through fraud orders that she had no such rights. Because of those orders, Mrs. Deupree told Appellant everything regarding her relationship to Williams, Sr. had been decided against her. 873 F.2d at 622. Appellees always have had the information necessary to determine Appellant's rights and could have filed an action to declare those rights at any time before 1981. This knowledge and ability to preserve relevant evidence by way of litigation defeats the claim of prejudice. *Hill v. W. Bruns & Co.*, 498 F.2d 565, 568-69 (2d Cir. 1974); *Vega v. The Malula*, 291 F.2d 415, 419-20 (5th Cir. 1961).[3]

(Continued from previous page)

will suffer if Appellant's rights are recognized. Licenses granted by one copyright owner are binding on all co-owners. *McKay v. Columbia Broadcasting Systems, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963). Recognition of Appellant's status will not invalidate any of the licenses or in any way affect the licensees' rights thereunder.

[3] The Alabama Court's decision also disposes of Appellees' other defenses as a matter of law. The fraud tolls the statute of limitations until Appellant learned the contents of

(Continued on following page)

Finally, as this Court recognized, laches is found only where the prejudice proximately results from the delay. 873 F.2d at 625. Appellees concede they relied on the 1967-1968 rulings as having determined Appellant's status and rights adversely to her and those orders being *res judicata* or collateral estoppel in any claim she might later assert. [Joint Brief at 30]. In and after 1975, Appellees acted in reliance on those orders being final, not on Appellant's failure to claim her renewal copyright interests between 1981 and 1985 [*Id.*, Jt. App. 250a, 253a]. The Alabama Court has set those orders aside, rejecting the argument that Appellant's third-party claim for such relief was time-barred. [Opinion at 27-29]. Any economic detriment from now having to recognize Appellant's statutory rights[4] results from the 1967-1968 orders having been set aside in the Alabama litigation, not Appellant's failure to file this lawsuit before 1981. The necessary proximate cause is missing.

(Continued from previous page)

the custody/support agreement in 1984. *Holmberg v. Armbrecht, supra.* Even if the limitations period began earlier, Appellant is entitled to an accounting back to September 12, 1982. *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108 (2d Cir. 1977). The fraud defeats Appellees' *res judicata* and collateral estoppel defenses [Opinion at 27]. That Appellant is an heir [*Id.* at 29-40] means, without more, that she owns an interest in those renewals governed by the 1909 Act. *DeSylva v. Ballentine*, 351 U.S. 570 (1956). That Appellant is a natural child means, without more, that she owns an interest in those renewals governed by the 1976 Act. 17 U.S.C. § 101. This Court can order a speedy and efficient resolution of this matter by remanding with directions to order the requested accounting without the need for further proceedings.

[4] Which is not prejudice for laches purposes. *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984).

II. THE REHEARING SHOULD BE IN BANC

The rehearing should be in banc because this Court's decision conflicts with *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), which held that an author's assignment does not eliminate his executor's renewal interest under § 24 of the 1909 Act because that interest belongs only to the executor. "The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it." 362 U.S. at 375. The Court held it would be an impermissible judicial redesigning of the statute to eliminate the executor's Congressionally-granted renewal rights by applying the "usual rule" that an executor takes estate assets subject to the testator's prior contracts. *Id.* at 377.

This Court's decision does just that by adding a deadline for establishing renewal copyright ownership which is not in the statute and which will differ depending on how different courts view necessarily unique combinations of delay, excuses and prejudice.[5] Before this Court's decision, members of the specified classes became possessed of their interests automatically upon the occurrence of the statutorily-prescribed circumstances. *Miller Music*, 362 U.S. at 375-78. This Court's judicial legislation makes unpredictable what Congress sought to simplify and make certain by enacting the 1976 Act.

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[5] The laches deadline in this case was inserted by way of a summary judgment motion held under submission for 13 months and deprives Appellant of her statutory rights for the 37-43 years remaining in the renewals.

An additional reason for an in banc rehearing is that the decision conflicts with *Menendez v. Holt*, 128 U.S. 514 (1888) and *New Era Publications ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576 (2d Cir. 1989) by applying laches to divest Appellant of her renewal rights rather than only denying her an accounting of the pre-complaint licensing of those rights. This conflict will generate confusion as to the parties' rights under the Alabama Court's decision, which establishes the factual prerequisites to Appellant's ownership of the renewals. Appellees will argue this Court's decision precludes Appellant from asserting such rights. The resulting uncertainty, not only between the parties but also in the public's mind because of the press reports of the conflicting decisions, will have to be settled in future litigation.

Appellant is prevented from presenting these arguments in greater detail by the page limit set in the August 24, 1989 order, and respectfully directs the Court's attention to pages 19-31 of her Petition for Writ of Certiorari filed on August 19, 1989. That Petition, excluding the Appendices, is attached hereto.

Dated: September 6, 1989

Respectfully submitted,

COBLENCE WARNER
HAMILTON & SMITH
1370 Avenue of the
Americas
New York, New York
10019

OF COUNSEL:
KENNETH E. WARNER

RUDIN AND APPEL
A Professional
Corporation
9601 Wilshire Blvd.,
Suite 800
Beverly Hills, California
90210

OF COUNSEL:
MILTON A. RUDIN
JOSEPH L. GOLDEN

ADDENDUM A

[Omitted, see App. F-1]

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 800, Beverly Hills, California 90210:

On September 6, 1989, I served the foregoing document described as follows: PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC on the interested parties in this action by placing two true copies thereof enclosed in three separate sealed envelopes with postage thereon fully prepaid in the United States Mail at Beverly Hills, California, each labeled with one of the following addresses:

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of an attorney who is a member of the bar of this Court at whose direction the service was made.

/s/ Christine H. Anderson
Christine H. Anderson

Subscribed to and sworn before me
on this 6th day of September, 1989.

/s/ Helen Montrose
Notary Public

OFFICIAL SEAL
HELEN MONTROSE
Notary Public - California
Los Angeles County

(SEAL)

My Comm. Exp. Apr. 23, 1991

SERVICE LIST

Alan L. Shulman, Esq.
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street
New York, New York 10022

Lawrence I. Fox, Esq.
Berger, Steingut, Weiner,
Fox & Stern
600 Madison Avenue
New York, New York 10022

Thomas R. Levy, Esq.
300 East 42nd Street, 9th Floor
New York, New York 10017

APPENDIX F-1

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

CATHY YVONNE STONE,

Petitioner,

vs.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and MILENE MUSIC, INC., MILENE MUSIC INC., FRED ROSE MUSIC INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MILTON A. RUDIN
Counsel of Record
JOSEPH L. GOLDEN
RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Boulevard
Beverly Hills, CA 90210
(213) 274-4844

Of Counsel:

KENNETH E. WARNER
COBLENCE, WARNER, HAMILTON & SMITH
1370 Avenue of the Americas
New York, NY 10019
(212) 957-9700

Attorneys for Petitioner

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a court can divest owners of Congressionally-granted renewal copyrights of their interests and reallocate them to others by dismissing actions to declare and enforce those rights on the grounds of laches.

a) Whether denying to owners of renewal copyright interests the opportunity to obtain a judicial declaration of those rights on the ground of laches, thereby reallocating the interests to others, judicially redesigns former 17 U.S.C. §24 and present 17 U.S.C. §304(a) in violation of *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), and adds conditions to such ownership which Congress has not required.

2. Whether the Court of Appeals' decision denying Petitioner's request that she be declared the owner of an interest in the renewal copyrights to the over 100 songs written by Hiriam "Hank" Williams conflicts with the Alabama Supreme Court's decision in *Stone v. Gulf American Fire and Casualty Co.*, ___ So.2d ___ (Ala., July 5, 1989) and this Court's decision in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), under which decisions Petitioner is Williams' child for purposes of §§24 and 304(a), thereby producing uncertainty, confusion and further litigation with respect to those renewal copyrights.

3. Whether the District Court's entry of summary judgment and the Court of Appeals' affirmance thereof are so devoid of evidentiary support in light of Respondents' prior knowledge of Petitioner and her rights and their fraudulent concealment of those rights from her so as to increase their financial gain, as to require this Court, in the exercise of its supervisory authority, to correct the error and prevent the great confusion and uncertainty in the future administration of the copyright laws which will result from that decision.

II. PARTIES TO THE PROCEEDINGS

Petitioner Cathy Yvonne Stone ("Petitioner") is the illegitimate daughter and heir of the late country and western songwriter and performer Hiriam "Hank" Williams ("Williams, Sr."). As such, she claims a "child's" interest in the renewal copyrights to his compositions pursuant to §24 of the Copyright Law of 1909 and §304(a) of the Copyright Law of 1976.

Respondent Hank Williams, Jr. ("Williams, Jr.") is Williams, Sr.'s son, and was the owner of a "child's" interest in those renewal copyrights before 1963, when he assigned it to a predecessor of Respondents Acuff-Rose-Opryland Music, Inc., Milene-Opryland Music, Inc., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc. ("Acuff/Rose Respondents").

Respondent Billie Jean Williams Berlin ("Berlin") was Williams, Sr.'s common law or putative wife when he died in 1953. In 1975, she was held to own the "widow's" interest in the renewal copyrights which she previously had assigned to a predecessor of Respondents Aberbach

Enterprises, Ltd. and Chappell Music Company ("Aberbach Respondents"). There were no other parties to the proceedings below.

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No.___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CATHY YVONNE STONE,

Petitioner,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & Co., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Second Circuit, entered on April 21, 1989.

IV. OPINIONS BELOW AND IN THE PARALLEL ALABAMA LITIGATION

The Court of Appeals' opinion, reported at 873 F.2d 620 (2d Cir. 1989), is reproduced in Appendix A. The unreported opinion of the District Court for the Southern District of New York is reproduced in Appendix B. The as yet unreported July 5, 1989, Opinion of the Alabama Supreme Court in the parallel Alabama litigation is reproduced in Appendix C.

V. JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1989. A timely petition for rehearing was denied on May 23, 1989, and this petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

Section 24 of the Copyright Law of 1909, as last amended ("1909 Act"), 17 U.S.C. §24 (1976 ed.), provided in pertinent part:

> The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . *And provided further*, That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a

further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright . . . .

Section 304 of the Copyright Law of 1976 ("1976 Act"), 17 U.S.C. §304, provides in pertinent part:

(a) Copyrights in Their First Term on January 1, 1978.

– Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured . . . *And provided further,* That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright. . . .

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.

– The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

VII. STATEMENT OF THE CASE

A. Statement Of Facts.

Williams, Sr. wrote over 100 musical compositions before his death intestate on January 1, 1953. Those songs were assigned to and copyrighted under the 1909 Act by predecessors of Respondent Fred Rose Music, Inc. The first of the copyrights expired in 1971, and pursuant to 1976 Act, §304(b), the renewal copyright to that composition will expire in 2018. The remaining copyrights' initial terms expired between 1974 and 1980, and the corresponding renewal copyrights will expire during the years 2022 through 2028. When this lawsuit was filed on September 12, 1985, 34 years remained in the first renewal copyright and 37 to 43 years remained in the other 100.[1]

Petitioner's natural mother was Bobbie W. Jett. While pregnant with Petitioner, Jett and Williams, Sr. executed an agreement dated October 15, 1952, which provided for,

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[1] Stated differently, only 13 years of the first and only 4 to 10 years of the other renewal copyrights had passed. The distribution of the renewal copyright expirations is as follows (the initial terms' expirations are shown in parentheses): 1 composition in 2018 (1971), 2 in 2022 (1974), 18 in 2023 (1975), 17 in 2024 (1976), 18 in 2025 (1977), 29 in 2026 (1978), 13 in 2027 (1979), and 3 in 2028 (1980).

Petitioner was denied discovery of the revenue earned from these renewals. Thus, the record below did not contain any evidence of which renewals were generating revenue and how much that revenue amounted to during the few years of their existence before the action was brought. Recently-published reports have estimated the annual income to be over $500,000. Morris, "Daughter Wins Claim To Hank's Estate", *Billboard*, July 22, 1989, at 89.

inter alia, Petitioner's custody and support. The agreement was prepared by Williams, Sr.'s attorney, Robert B. Stewart, and its execution was witnessed by Stewart and Williams, Sr.'s mother, Lillian Stone (hereinafter, "Mrs. Stone" or "grandmother"). Neither Petitioner (as yet unborn) nor Jett were represented by counsel.

By this agreement, which describes him as Petitioner's father three times, Williams, Sr. promised to pay Jett's room and board until Petitioner was born and the medical expenses incurred in connection with the birth. Petitioner was to be placed in her grandmother's care until the age of three, at which time Williams, Sr. was to have custody of her. When Petitioner turned six, her custody was to be shared between her father and mother. Williams, Sr. agreed to provide the child's sole support regardless of who had physical custody. The agreement's operative provisions are quoted in App. C, at 8-11.

Petitioner was born on January 6, 1953, five days after Williams, Sr. died. Jett left Petitioner with Mrs. Stone several days later and then moved to California. Mrs. Stone acknowledged to the Alabama Department of Pensions & Security and others that her son was Petitioner's father. Petitioner was adopted and cared for by her grandmother until the latter died in 1955. When Irene Smith, Williams, Sr.'s sister (and thus Petitioner's aunt), reneged on her promise to care for Petitioner if Mrs. Stone could not, Petitioner was made a ward of the state. Smith also acknowledged to the adoption agency representatives and others that her brother was Petitioner's father. The contemporaneous adoption records, sealed pursuant to state law, state that Williams, Sr. is Petitioner's father. Petitioner lived in a foster home until she

was placed with and, in 1959, adopted by George and Mary Deupree.

In 1960 or 1961, Fred Rose Music, Inc. began negotiating with Stewart, as counsel for Smith who was then Williams, Jr.'s guardian, to acquire Williams, Jr.'s contingent renewal copyright interests. When Fred Rose Music learned from Stewart about Petitioner and her potential claim to the Williams, Sr. estate and the renewal copyrights during these negotiations, it began discussing with Stewart how Petitioner's rights could be cut off. App. C at 37-40. Fred Rose Music suggested to Stewart that it make a nominal payment to the Alabama Welfare Department on Petitioner's behalf to terminate her rights.

Stewart advised that a token payment would not suffice because "the statutory right of [Petitioner] comes to [her] through [her] father, and since the federal courts have held this right belongs to an illegitimate, we may be faced with a difficult problem, and certainly one we would not want to litigate." App. C at 39. Stewart suggested three alternatives: (1) consider that Petitioner's rights had been lost by her adoption; (2) attempt to negotiate a "cooperative settlement" from the Welfare Department; or (3) ask the court to appoint a guardian for "other possible minors who might claim similar renewal rights." Stewart concluded that none of the alternatives guaranteed success and would require full disclosure of the facts. *Id.* at 39-40. Rather than do so and settle any question about Petitioner's rights before it acquired Williams, Jr.'s interest, Fred Rose Music embarked upon a course of conduct with Stewart and Smith to maximize the value of Williams Jr.'s interest by concealing Petitioner's rights from her and the world.

By a March 20, 1963, agreement with Smith as Williams Jr.'s guardian, Fred Rose Music was assigned his contingent renewal copyright interest in exchange for $25,000 and the royalties specified in Fred Rose Music's earlier contracts with Williams, Sr.[2] Although all parties to the assignment knew of Petitioner's interest, she is not included in the agreement's list of people warranted to be the only other "children" or "next of kin". The agreement also provided that, should any person successfully claim an interest in the renewal copyrights, any monies payable to that person would be paid solely by Williams, Jr.[3] An action was brought in the Alabama state court by Smith on Williams, Jr.'s behalf to obtain approval of the assignment. Stewart represented Smith and Williams, Jr. in that

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[2] These royalties included the industry standard 50% of mechanical license fees. *See Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 735 (2d Cir. 1983), *rev'd sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985).

[3] Fred Rose Music and Stewart decided not to attempt to purchase Petitioner's interest because that would have required Williams, Jr. to share his royalties with her. Well aware that the assignment from Williams, Jr. had value only if he was alive when the renewal copyrights came into existence, *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377-78 (1960), Fred Rose Music also purchased Smith's contingent interest as Williams, Sr.'s next of kin for $5,000, obtained an assignment from Smith's son of his contingent interest for no additional payment, purchased the contingent interest belonging to Williams, Sr.'s half-sister for $2,000, and that of his father for $1,500. Fred Rose Music did not approach Berlin because it erroneously believed that she had relinquished her renewal rights in 1953. *See*. pp. 16-19, *infra*.

proceeding. Petitioner's existence and relationship to Williams, Sr. was not disclosed, and the court approved the agreement.

Several years later, this assignment was challenged by Audrey Mae Williams, Williams, Sr.'s first wife and Williams, Jr.'s mother. She argued the amount paid to Williams, Jr. was unreasonably small given the value of the renewals. To justify the $25,000 payment, Smith advised the court for the first time that there might be others possessed of an interest in the renewal copyrights. Drayton Hamilton was appointed guardian *ad litem* for any unknown potential heirs.[4]

Upon learning of the circumstances surrounding Petitioner's birth and over the objections of her adoptive parents, Hamilton argued that Petitioner was an heir of Williams, Sr. and entitled to share in his estate. The 1952 custody/support agreement was disclosed for the first time as part of this proceeding. Williams, Jr. objected to the court adjudicating Petitioner's interest in the renewal copyrights, but Fred Rose Music insisted that the issue be determined so that a favorable ruling could be raised to bar any claim she might later assert. The state court ruled that Williams, Jr. was the only heir because Petitioner had not been legitimated in the manner then required by

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[4] Hamilton had acted as Petitioner's guardian *ad litem* in the probate of Mrs. Stone's will, at which time he knew only that she had been adopted by Mrs. Stone. Smith, the sole beneficiary under that will, successfully defeated Hamilton's attempt to have Petitioner, her niece, deemed to be a pretermitted heir of Mrs. Stone's. *Hamilton v. Smith*, 86 So.2d 283 (Ala. 1956).

Alabama law and had been adopted twice after Williams, Sr.'s death. That court did not rule on the issue of Petitioner's paternity, concluding that because she was not an heir, under *De Sylva v. Ballentine*, 351 U.S. 570 (1956), she could not be a child under §24 of the 1909 Act even if she was Williams, Sr.'s illegitimate daughter. The Deuprees told Hamilton not to pursue the matter further and the state court ordered him not to appeal its rulings.

Stewart replaced Smith as administrator of the Williams, Sr. estate after she was convicted of cocaine smuggling in 1969. Even though the Alabama court had ruled Petitioner was not an heir, Stewart began setting aside a portion of the estate income in case the issue was revisited and did so until the estate was closed in 1975. Petitioner submits that Stewart took this precaution because of amendments to the 1909 Act, first proposed in the mid 1960's, which provided that illegitimates were children for purposes of §24 in order to eliminate the lack of uniformity on that issue produced by this Court's direction in *De Sylva v. Ballentine, supra*, 351 U.S. at 581-82, to refer to state laws of intestate succession for that determination.[5]

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[5] This case illustrates the vice of *De Sylva v. Ballentine*'s reference to state law. Had the only issue been whether Petitioner was Williams, Sr.'s natural daughter, it could have been determined in 1968 and probably would have been decided in Petitioner's favor, as it later was in 1985. Moreover, had California rather than Alabama law applied, Petitioner would have been an heir, and thus a child for purposes of §24, because the 1952 custody/support agreement satisfied the requirements of then Calif. Prob. Code §255. 351 U.S. at 581-82. However, the Alabama court held in 1968 that it did not meet the additional requirements of the Alabama statute then in effect. Congress eliminated this disparate treatment by enacting the 1976 Act.

Though Berlin and the Aberbach Respondents were not parties to the 1967-1968 proceedings, they learned of Petitioner and her renewal rights and joined in the scheme to keep her ignorant of those rights long before this case was filed. In August 1953, Berlin, Mrs. Stone, Audrey Mae Williams and Williams, Jr.'s guardian at that time (not Smith) entered into an agreement pursuant to which Berlin relinquished her claims to the Williams, Sr. estate in exchange for $30,000. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420, 430-31 (M.D. Tenn. 1975), *aff'd*, 570 F.2d 554 (6th Cir. 1978). Perhaps alerted by news accounts of the 1967-1968 Alabama proceedings, Hill & Range Songs, Inc., a predecessor of Respondent Aberbach, began looking for other potential claimants to the renewal copyrights. Berlin was found, and in 1969 she assigned whatever contingent interest she might have to Hill & Range. *Id.* at 423-24.

Hill & Range then filed an action seeking a declaration that (through Berlin) it was entitled to a 50% interest in the renewals. Petitioner's existence and the contents of the 1952 custody/support agreement were disclosed as part of Stewart's 1973 deposition in that case. It was agreed among the parties and Stewart that the document would not be made an exhibit or disclosed further because it was not in the best interests of either party to make the agreement part of the court record.

Fred Rose Music opposed Hill & Range's claim on the ground that by executing the 1953 settlement agreement, Berlin relinquished her renewal copyright interest. After a trial in 1975, the court ruled that the settlement agreement did not extinguish Berlin's interest in the renewals. *Id.* at 432. Williams, Jr. and the Acuff/Rose Respondents

thereafter were required to share the renewal copyright revenue with Berlin and the Aberbach Respondents regardless of any agreements they previously had entered into believing that Berlin owned no such rights. Then, in 1976, Congress enacted the new Copyright Law which, in §101, specifically included illegitimates within the definition of children for purposes of renewal copyrights. Even after these two events, Respondents took no steps to determine or acquire Petitioner's renewal rights and continued to conduct their respective businesses fully aware of those rights.

Petitioner was entitled to receive approximately $3,800 from Mrs. Stone's homestead allowance when she turned 21. As that date approached, in late 1973 Mrs. Deupree told Petitioner of the rumors that she might be Williams, Sr.'s illegitimate daughter but that the issue of her relationship to him already had been decided against her. Petitioner claimed her homestead allowance[6] in 1974, and when Stewart learned of this in April of that year, which was during the Hill & Range litigation, he advised counsel for Williams, Jr. that "trouble might ensue". App. C at 47.

Petitioner began looking into her background at this time. She read Sing a Sad Song, a biography of Williams, Sr. The possibility of an illegitimate daughter was mentioned in that book, and Petitioner thought she might be that child. The author also speculated that the child's inheritance status might be changed vis a vis copyrights

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[6] This was pursuant to a statute enacted as the result of the holding in *Hamilton v. Smith*, *supra*, 86 So. 2d at 285, n. 1.

because of unidentified proposed legislation. Petitioner attempted to learn the identity of her natural mother, and also made inquiries regarding her father. She did so not for the monetary value of the renewal copyrights, but rather to discover the identity of her natural parents. However, Petitioner was ambivalent about pursuing this investigation because of her close relationship with her adoptive parents. This conflict continued until Mr. Deupree told Petitioner in December, 1980, that he had been wrong in not allowing Hamilton to appeal the 1967 and 1968 state court rulings, and that he would help if Petitioner still wanted to find out if Williams, Sr. was her father.

Petitioner then resumed her efforts to determine her biological ancestry. She unsuccessfully tried to obtain her adoption records from the Alabama Department of Pensions & Security. In 1981 she read books and newspaper articles about Williams, Sr. and visited acquaintances and relatives of his. She found out that Jett had died in 1974, and visited with members of her natural mother's family. Petitioner also met Hamilton, who accompanied Petitioner to the courthouse and went through the public records of the earlier proceedings with her. The custody/support agreement was not in those public files and Hamilton did not discuss it with her other than to tell her the document was a sealed court record. Mr. Deupree asked his attorney, a general practitioner unfamiliar with copyright law, to assist Petitioner in her efforts, but nothing came of that.

In September 1984, Petitioner met F. Keith Adkinson, an attorney, who she subsequently married. Adkinson obtained a copy of the custody/support agreement and

read it to Petitioner over the telephone. That was when she first learned that Williams, Sr. had not intended to abandon her but rather had desired to have custody of and provide for her. After consulting with counsel experienced in copyright law, Petitioner sent notice of her claim to Respondents in August, 1985.

B. History Of The Case.

Petitioner filed this action on September 12, 1985. After discovery revealed the existence of defendants not originally named and facts giving rise to a tort claim, Petitioner amended her complaint to add those defendants and that claim. The ten persons and entities who are Respondents in this Court were defendants below. Jurisdiction in the trial court was invoked under 28 U.S.C. §§1332 and 1338 as to the first claim for relief and 28 U.S.C. §1332 and the doctrine of pendent jurisdiction as to the second.

Petitioner's third amended complaint was the operative pleading when the District Court entered its summary judgment. Her first claim for relief sought, *inter alia*, (1) a declaration that she is the natural daughter of Williams, Sr. and, as such and pursuant to §§24 and 304(a), owns a 33-1/3% interest in the renewal copyrights; (2) an accounting of the income derived from Respondents' licensing of the renewal copyrights since their inception and the imposition of a constructive trust on her share of that revenue; and (3) a declaration that the 1968 Alabama state court order was null and void to the extent it purported to deny Petitioner rights under the 1909 Act. The second claim for relief alleged that, beginning in 1960 or

1961, Williams, Jr., the Acuff/Rose Respondents and others not parties to this litigation conspired to prevent Petitioner from learning of and claiming her renewal copyright interests in order to retain for themselves the revenues earned from those copyrights.

In March 1987, Respondents filed a joint motion for summary judgment on the ground that, as a matter of law under *De Sylva v. Ballentine*, Petitioner is not Williams, Sr.'s child for purposes of renewal copyrights under either §24 or §304(a). In addition, Respondents argued the first claim for relief was barred by *res judicata*, collateral estoppel, the 1976 Act statute of limitations, laches, estoppel and waiver. Respondents also argued that the District Court lacked jurisdiction over the first claim because it did not arise under the Copyright Laws and diversity jurisdiction did not exist. The motion also sought a ruling that Petitioner's conspiracy claim did not state a claim upon which relief might be granted and/or was time-barred.

In addition to joining this motion, Berlin and the Aberbach Respondents filed a separate motion for partial summary judgment seeking a determination that, even if Petitioner possessed an interest in the renewal copyrights, she, Williams, Jr. and the Acuff/Rose Respondents should share the children's 50% interest while Berlin and the Aberbach Respondents should share the widow's 50% interest.[7] Petitioner filed a cross-motion for partial summary judgment seeking a declaration that, as a biological

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[7] This Court left that question open in *De Sylva v. Ballentine, supra*, 351 U.S. at 582.

child of Williams, Sr., she was entitled to a 33-1/3% interest in the renewal copyrights.

The motions were argued on August 6, 1987 and taken under submission. Thirteen months later the District Court granted Respondents' joint motion, but on the sole ground that Petitioner had been guilty of laches. The District Court assumed for purposes of its decision that Petitioner was Williams, Sr.'s natural child,[8] but held as a matter of law that she had unreasonably delayed pursuing her claim between 1974 and 1981, and on the basis of conclusory affidavits, that Respondents would be prejudiced if the case was allowed to proceed [App. B. at 31, 33-37]. The District Court did not reach any of the other significant issues presented in the joint motion for summary judgment, the motion for partial summary judgment filed by Berlin and the Aberbach Respondents or Petitioner's cross-motion for partial summary judgment.[9]

Petitioner appealed to the Court of Appeals for the Second Circuit. On April 21, 1989 that Court affirmed the judgment of the District Court, but on different grounds. The Court of Appeals held that Petitioner's failure to file

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[8] By this time, the trial court in the parallel Alabama litigation had found that she was Williams, Sr.'s natural daughter. That ruling had not been appealed and was final when the District Court entered its judgment.

[9] Among those were (1) whether *De Sylva v. Ballentine* or §101 of the 1976 Act controls the determination of who is a child for renewal copyright purposes after the effective date of that Act and (2) the respective ownership percentages of widows and children under §§24 and 304(a). These issues, still unresolved after many years, create uncertainty and confusion in this very important area of copyright law.

her complaint between 1974 and 1980 "may well have been entirely excusable under the circumstances." 873 F.2d at 624. It held, however, that her delay from December 1980 to September 1985 was without plausible explanation and, based upon the same conclusory affidavits, that Respondents would be prejudiced because of the death or faded recollection of certain witnesses and because Respondents had entered into transactions in reliance on Petitioner's failure to assert her claim during that time. *Id.* at 625-26. Petitioner was denied all the relief she requested, rather than being denied only an accounting of the income earned before the suit was filed but being allowed to obtain a declaration of her rights and an accounting of the revenue to be earned during the 34 to 43 years remaining in the renewal copyrights after September 1985. Petitioner's petition for rehearing was denied on May 23, 1989.[10]

C. The Parallel Alabama Litigation.

While Petitioner was prosecuting this action, litigation over her status as an heir of Williams, Sr., her rights to the copyrights, and the validity of the 1967 and 1968 orders was proceeding in Alabama as well. Respondents

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[10] On August 1, 1989, Petitioner filed a motion to recall the Court of Appeals' mandate and for leave to file a second petition for rehearing and rehearing in banc. She did so to enable the Court of Appeals to reconsider its decision in light of the Alabama Supreme Court's decision and *New Era Publications International ApS. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989). In *New Era Publications*, another panel of the Second Circuit recognized that laches does not destroy copyright interests, but only determines the form of relief available against the alleged infringer. This motion has not yet been decided.

Williams, Jr., Acuff and Rose filed that action against Petitioner on September 10, 1985, seeking alternative declarations that (1) those orders barred her from establishing herself to be a natural child of Williams, Sr. and claiming an interest in his estate, or (2) if the orders were set aside, that the Alabama court adjudicate her rights to the copyrights and as an heir of Williams, Sr. App. C, at 3-4, n. 2. Petitioner counterclaimed, seeking a determination that she is the biological daughter of Williams, Sr and is entitled to her proportionate share of his estate.

On July 14, 1987, the trial court granted summary judgment against Petitioner on the complaint and her counterclaim, holding that because Petitioner had not been legitimated pursuant to the procedures available under Alabama law at the time of her birth or at the time of its ruling, and had been adopted by her grandmother and, subsequently, the Deuprees, she was not an heir of Williams, Sr. That court also held that the 1967 and 1968 orders barred Petitioner from relitigating this issue.

The court further found that disputed fact issues as to Petitioner's paternity required a trial of that question. That trial was held, and based upon the witnesses' testimony and documentary evidence submitted by the parties, the court held on October 26, 1987, in a ruling which is now final, that Petitioner is a natural child of Williams, Sr.

Petitioner had also filed a third party complaint against Irene Smith, Stewart's estate (later dismissed), and Stewart's now dissolved law firm, Jones, Murray and Stewart, P.C. Petitioner there alleged, *inter alia*, that the 1967 and 1968 orders had been obtained through legal

fraud committed by those third party defendants and other, fictitiously-named defendants."[11]

The trial court entered summary judgment against Petitioner on this pleading as well. It held that because Petitioner could not have been established as Williams, Sr.'s heir under the law applicable during the 1967 and 1968 proceedings, the failure by the third party defendants and others (*i.e.*, the Acuff/Rose Respondents) to disclose her existence did not give her a cause of action against them.

Petitioner appealed to the Alabama Supreme Court, which on July 5, 1989, reversed that ruling. It held that legal fraud had been committed in the 1967 and 1968 proceedings in that (1) Smith, Stewart and others had concealed from the court the circumstances surrounding Petitioner's birth and subsequent correspondence regarding her potential rights, (2) had concealed the fact that Williams, Sr., Mrs. Stone and Smith all had acknowledged that Petitioner was Williams, Sr.'s daughter, and (3) that Stewart, Smith and others, including Respondents Williams, Jr. and Rose, had affirmatively prevented Petitioner from learning of and asserting her rights to the estate and the renewal copyrights.

The Alabama Supreme Court also held that the evidence of Petitioner's paternity was clear and

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[11] Gulf American Fire and Casualty Company and its successor in interest, American States Insurance Company, the sureties on the bonds Smith and Stewart posted when they were appointed administrators of the estate, also were named third party defendants.

convincing,[12] that in 1967 and 1968 the state court erred in denying Hamilton's request to appeal its rulings, and that, because Petitioner had not been granted access to the records concerning her adoption until 1984 and had filed suit promptly thereafter, her third party complaint was not barred by laches. The Court set aside the 1967 and 1968 judgments in part, and held that Petitioner "is entitled to receive her proportionate share of any proceeds of the estate of her natural father, Hank Williams, including any income or interest, and of any copyright royalties, but prospectively only from the date she gave notice of her claim August 5, 1985." App. C at 101.

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[12] The clear and convincing evidence was that: 1) the 1952 custody and support agreement, that was drafted by Williams's attorney, refers to Hank Williams throughout as the father of the child; 2) the 1952 agreement, itself, requires a relinquishment by the mother of virtually all rights in the child to Hank Williams; 3) the 1952 agreement provided that the mother be given a one-way plane ticket to California, and that the child live with Lillian Stone, Williams's mother, for two years, during which time he would fully support the child; 4) the 1952 agreement provided that at the age of 3, the child "was to live with him [Hank Williams] continuously and be wholly and completely supported for by him, and cared for by him" (it is interesting to note that at the time this agreement was drafted, Wiiiiams, Jr., did not live with his father, but rather, lived in Tennessee with his mother, Audrey Williams; it appears, then, that Hank Williams attempted to provide the opportunity for a closer parent-child relationship with Stone, who was to live with him, than that being enjoyed by his other child); 5) Lillian Stone, Irene Smith, and other family members acknowledged and publicly held the child out as the daughter of Hank Williams; and 6) the records of the Montgomery County Department of Public Welfare repeatedly document that Stone's natural father was Hank Williams. App. C at 88, n. 23.

VIII. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Decision Destroys The Uniformity And Certainty Of Renewal Copyright Ownership Under Section 24 Of The 1909 Act And Section 304 Of The 1976 Act.

Because the lower court's decision destroys the certainty and uniformity in renewal copyright ownership intended by Congress and will have a substantial destabilizing effect upon the future administration of the copyright laws, plenary review by this Court is required. *De Sylva v. Ballentine, supra,* 351 U.S. at 572. Before the lower court's decision, members of the specified classes became possessed of their interests automatically upon the occurrence of the statutorily-prescribed circumstances. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375-78 (1960); *Hill & Range Songs, Inc. v. Fred Rose Music, Inc., supra,* 403 F. Supp. at 432.

The only requirement (other than being a class member) was that the renewal copyright be registered in the manner and time set by statute. Even that was not required of every class member. Each class member owns an undivided interest in the renewal copyright. *De Sylva v. Ballentine, supra,* 351 U.S. at 580. Because they are joint owners, one member's registration suffices for all. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); 1 *Nimmer On Copyright*, §9.05[E] (1988). The co-owner who files the registration holds the renewal copyright in trust for all other co-owners. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co*, 221 F.2d 569 (2d Cir. 1955), *modified*, 223 F.2d 252 (2d Cir. 1955). There was no deadline by which a particular class member had to identify himself to the co-owners and claim his proportionate

share of the interest. For example, Respondent Berlin was not so identified and her interest was not claimed until 19 years after that interest vested. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc., supra.*

These settled principles are now open to question and copyright owners, their assignees and licensees, music publishers and others no longer can rely on their continued validity. By establishing a second time period of uncertain duration within which a renewal copyright interest must be asserted or forever lost, the Court of Appeals has introduced uncertainty and lack of uniformity into the carefully constructed statutory scheme. No longer is it sufficient for a class member to be alive when the renewal term begins, which is all §304(a) requires. All class members must now promptly identify themselves to each of the co-owners *and* obtain an enforceable acknowledgment of their respective interests.

Simply being identified as a co-owner is not enough under the lower court's decision. Respondents knew of Petitioner and of her renewal rights no later than 1973, years before she knew who they were and that she might have such rights. Yet that prior *actual knowledge and Respondents' efforts to keep her ignorant of her rights* was not sufficient to preserve Petitioner's interest. The lower court held she was required to do the superfluous act of advising Respondents of what they already knew and filing suit to obtain a judicial declaration of her rights more promptly than she did.

It is unknown how quickly this heretofore unnecessary step must be taken. Whether one has waited too long will depend upon how a particular court views the facts,

and different courts view the same facts differently. In this case, the District Court and Court of Appeals came to opposite conclusions with respect to which periods of delay were excusable [See pp. 28-29 *supra*]. Additionally, the failure to act by different people owning different renewal copyrights for the same length of time may result in one being divested of his copyright interest (if the court hearing that case concludes the delay was inexcusable and prejudice is established) and the other retaining his interest because a different court concludes the same delay is excusable and/or the co-owners have not been prejudiced.

This judicially-created uncertainty and lack of uniformity can even exist with respect to the same renewal copyright. If one of the defendant co-owners is responsible for the plaintiff's delay, that defendant could not succeed on a laches defense. *Holmberg v. Armbrecht*, 327 U.S. 292 [sic], 396-97 (1946). But if other defendant co-owners are innocent of wrongdoing, they could succeed on the same defense. In that not unlikely circumstance,[13] the renewal copyright interest would not be divested vis a vis the culpable co-owner but would be divested vis a vis the non-culpable co-owner.

It is permissible to fashion the scope of the accounting granted a renewal copyright owner after the property right is recognized if that is necessary to achieve equity under circumstances which are unique to a given case. It is not permissible for the ownership of the interest to be

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[13] *See, e.g., Haas v. Leo Feist Inc.*, 234 F. 105 (S.D.N.Y. 1916) [intentional and innocent infringers treated differently].

determined on a case by case basis according to circumstances which Congress did not specify in the statute.

A writ of certiorari should issue not only because of the aforesaid uncertainty and confusion, but also because the lower court's decision conflicts with *Miller Music Corp. v. Charles N. Daniels, Inc., supra.* In that case, this Court held that an author's assignment did not transfer or otherwise eliminate the executor's renewal copyright interest because that interest, by statute, belongs only to him. "The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it." 362 U.S. at 375.

Even though executors usually obtain no greater property rights than their testators and usually take estate assets subject to any contracts entered into by their testator, this Court refused to apply those "usual rules" to renewal copyrights because §24 of the 1909 Act did not contain any such qualifications or limitations. This Court held it was not the province of the judiciary to engraft a rule on §24 which treated executors differently from the other class members, even if that rule applied to executors in all other circumstances. It was equally beyond the province of the lower court to amend §§24 and 304(a) by establishing a time limit as uncertain as laches upon the assertion of renewal rights. The lower court's decision will produce widespread confusion and uncertainty in the determination of renewal copyright ownership unless this Court corrects the error.

B. In Denying Petitioner The Opportunity to Obtain A Declaration Of Her Rights And Prospective Relief, The Court Of Appeals' Decision Conflicts With *Menendez v. Holt*, 128 U.S. 514 (1888), And Produces Confusion With The Alabama Supreme Court's Decision.

The requested writ should issue for the additional reason that the Court of Appeals' decision conflicts with the principle established in *Menendez v. Holt*, 128 U.S. 514 (1888), that, in cases such as this, laches does not preclude prospective relief. The lower court's disregard of this rule will generate confusion as to the parties' rights under the Alabama Supreme Court's decision that under Alabama law, she is an heir of Williams, Sr., and its reaffirmation of the trial court's finding that she is his natural daughter. That she is an heir, without more, makes Petitioner a child for purposes of the renewal copyrights governed by the 1909 Act. *De Sylva v. Ballentine, supra*, 351 U.S. at 582. That she is Williams, Sr.'s natural daughter, without more, makes Petitioner a child under 1976 Act, §101, and thus a renewal copyright owner under §304(a) as well. This decision, which is entitled to full faith and credit in all other courts, establishes the factual prerequisites to Petitioner's ownership of the renewal copyrights.

As the owner of an interest in those copyrights, Petitioner is entitled to license others to use, perform and copy the compositions, publish and/or perform them herself, and assert the other rights of a copyright owner under 1976 Act, §106, [sic] 17 U.S.C. §106. When it

becomes final, Petitioner also will be entitled to enforce the Alabama judgment against Williams, Jr. and the other Respondents wherever they are located, including the Second Circuit, to obtain an accounting of her proportionate share of the renewal copyright revenues earned since August 1985.

It must be expected that Respondents will argue Petitioner is not a renewal copyright owner and is not entitled to such relief because of the lower court's decision. That contention is erroneous, but the confusion and uncertainty Respondents will create by asserting it will have to be settled by an indeterminable number of lower courts. It may be that some courts will accept Respondents' argument while others reject it, producing yet more conflict and confusion.

This uncertainty and confusion is possible only because the lower court failed to apply laches properly. The ownership of renewal copyrights is a federal question, *De Sylva v. Ballentine, supra,* 351 U.S. at 580, as is the application of laches to suits seeking the declaration and enforcement of those property rights. *See, Holmberg v. Armbrecht, supra,* 327 U.S. at 395-97; *Prather v. Neva Paperbacks, Inc.,* 446 F.2d 338, 339-40 (5th Cir. 1971). The Alabama Supreme Court correctly held [App. C at 66-71] that notwithstanding her supposed delay in asserting her rights, Petitioner is entitled to her proportionate share of the revenues earned from the renewal copyrights subsequent to August 5, 1985. *See, Menendez v. Holt,* 128 U.S. 514, 523-24 (1888).

Contrary to the Alabama decision and *Menendez v. Holt,* the lower court held Petitioner was entitled to no

relief, retrospective or prospective, because of the same supposed delay. In *Menendez v. Holt*, this Court held that, absent circumstances which do not exist in this case, laches does not bar prospective relief even though it may bar an accounting or recovery of damages with respect to events occurring before the action is filed. 128 U.S. at 523-24. In that trademark infringement case, this Court rejected the argument that laches effects the forfeiture of a valid mark, stating:

> The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long, and under such circumstances, as to defeat the right itself . . . Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs. It is, in realty [sic], no more than a revocable license.' 128 U.S. at 523-24.

In *Menendez*, there was no finding that the plaintiff had authorized or otherwise affirmatively consented to the defendant's use of the infringing mark. In this case there also was no finding that Petitioner affirmatively relinquished her renewal copyrights or authorized Respondent to exploit them on her behalf. Here, as in *Menendez*, there was only inaction resulting from ignorance.

This principle has been applied in copyright infringement actions where the plaintiff has not authorized the

copying or otherwise abandoned its copyright. *See, e.g., New Era Publications International, ApS. v. Henry Holt & Co.*, 873 F.2d 576, 584-85 (2d Cir. 1989); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 105 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960); *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 307 (S.D. Cal. 1959), *aff'd*, 281 F.2d 543 (9th Cir. 1960). *See generally*, 3 *Nimmer on Copyright*, §12.06 (1988).

The principle also is applied where the issue is timeliness under the Copyright Law statute of limitations, 17 U.S.C. §507(b). A failure to file suit within the limitations period will preclude only the availability of relief against a particular infringement; it does not affect in any way the copyright upon which suit is brought. *Prather v. Neva Paperbacks, Inc., supra*, 446 F.2d at 339. A plaintiff can recover damages or profits resulting from infringements occurring during the limitations period even if it took no action against infringements occurring earlier. *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108, 1110 (2d Cir. 1977).[14]

It has never been held that a copyright owner's failure to sue a particular infringer, standing alone, works a forfeiture or abandonment of his ownership of the copyright. Yet that is what Respondents will argue is the result of the lower court's decision. That is an impermissable

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[14] *Prather* and *Mount* applied §115(b) of the 1909 Act, which is substantially the same as §507(b) of the 1976 Act. *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983).

judicial amendment of §§24 and 304(a) which will produce great uncertainty, confusion and even more litigation in the lower courts unless this Court reverses that decision.

C. The Lower Court's Dismissal Was Based On Speculation, Not Evidence, And Denied Petitioner The Opportunity Of Having A Jury Decide The Issues.

The procedural posture of this case makes review of the Court of Appeals' decision even more necessary. In the Alabama litigation, Petitioner's status was decided at a trial. A trial on that and the other significant copyright issues in this case was precluded by the District Court's entry of summary judgment on the ground of laches, which was reviewed by the Court of Appeals under the easily satisfied abuse of discretion standard of review. 873 F.2d at 624. The lower courts held as a matter of law that Respondents would be prejudiced on the basis of conclusory affidavits which were so disingenuous as to require this Court, in the exercise of its supervisory authority, to issue the writ and determine whether such "evidence" should support the judicial legislation which occurred below.

The Court of Appeals concluded that Respondents would be prejudiced "to some degree" because "some of the key people having knowledge of the events preceding [Petitioner's] birth have died since 1974 – George Deupree, Bobbie Jett and Audrey Mae Williams."[15] 873 F.2d at

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[15] The Court of Appeals' slip opinion, reproduced as Appendix A, erroneously referred to Berlin instead of Williams at

(Continued on following page)

625. However, Petitioner's paternity was not relevant to the lower courts' decisions because both the District Court and the Court of Appeals assumed she was Williams, Sr.'s natural daughter [873 F.2d at 624, App. B at 8]. Moreover, the Alabama trial court had held she was his daughter and that decision, which was final before either of the decisions below was rendered, was entitled to full faith and credit. Thus evidence of events preceding Petitioner's birth was not material and the supposed difficulties of proof on the issue should not have been considered.

Furthermore, these three individuals either had no first hand knowledge of the events preceding Petitioner's birth [Deupree] or died before 1981, the year the Court of Appeals held that Petitioner's unreasonable delay began [Jett and Williams].[16] There were [sic] no evidentiary basis for the lower court's assumption of prejudice in this respect.

There also was no evidentiary support for the Court of Appeals' conclusion that because "the circumstances giving rise to this appeal have already spanned over two

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(Continued from previous page)

this point [App. A at 12]. Petitioner noted this error, among the many others, in her petition for rehearing. It was corrected in the opinion as reported. Audrey Mae Williams was divorced from Williams, Sr. in 1948, and again in 1952, before Petitioner was born. There is no indication whatsoever of what probative evidence she could have given.

[16] The Court of Appeals recognized that the absence of Jett's testimony "[could not] be found to prejudice [Respondents] because she would not have been alive to testify even if [Petitioner] had filed suit immediately." 873 F.2d at 625. The same is true of Audrey Williams, who died in 1975.

decades . . . the additional five years of [Petitioner's] unexcused delay doubtless would hamper the defense further. . . ." 873 F.2d at 625. There was no evidence that recollections which existed before 1981 had faded afterward; the lower court was merely speculating. Moreover, it always had been in Respondents' power to obtain a determination of the issue, just as the Aberbach Respondents did by instituting the *Hill & Range* litigation. In any event, Petitioner's was the only fading recollection mentioned, and any lack of recollection on her part would only benefit Respondents.

In fact, many of the people who had knowledge of Petitioner's paternity, her efforts to ascertain her ancestry and Respondents' alleged prejudice (the only fact issues relevant to laches) were alive after this case was filed and were deposed. These include Petitioner, Respondents, Smith, Mrs. Deupree, Jett's uncle, the judge who presided over the 1967-1968 Alabama proceedings, the adoption agency representatives involved in Petitioner's adoption and her later efforts to obtain the records, Hamilton, the friends and relatives of Williams, Sr. with whom Petitioner spoke, and the friends of Petitioner with whom she discussed her possible connection with Williams, Sr. The custody/support agreement, the correspondence about Petitioner, and the adoption agency and court records, all of which were contemporaneously-created, also were readily available to all parties in this case.

The lower courts held Respondents would be prejudiced because of the "numerous transactions involving Williams, Sr.'s songs" which they entered into. 873 F.2d at 625. No doubt the Acuff/Rose and Aberbach Respondents have granted numerous licenses under the renewal

copyrights. However, those licenses are granted for a specific use, not for a term of years, and the amount of the fee does not depend on the number of owners of the renewal copyright being licensed. The fee is either negotiated or set by the compulsory license statute. 17 U.S.C. §115. *See, Recording Indus. Ass'n. of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 4 (D.C. Cir. 1981). *See also, Mills Music, Inc. v. Snyder*, 469 U.S. 153, 157-58 (1985). Thus, these transactions could not support a finding of prejudice because they would have been on the same terms even if Petitioner had asserted her claim earlier. The Court of Appeals' reference to opportunity costs of other ventures not pursued was mere conjecture, as that court recognized. 873 F.2d at 626.

Williams, Jr. assigned away his renewal copyright interest in 1963 and Berlin assigned away her interest in 1969. Those Respondents' rights and duties under those agreements, including the standard royalties they were to be paid, were fixed long before Petitioner's supposed unreasonable delay began in 1981. Neither of these Respondents could have been lulled into a false sense of security by Petitioner's failure to challenge the 1967 and 1968 rulings earlier than she did, 873 F.2d at 626, because the Williams, Jr. assignment occurred before those rulings and Berlin's renewal copyright interest was not determined until 7 years after they were made. There was no evidence that either of these Respondents acted or failed to act during 1981-1985 because of Petitioner's failure to assert her claim during that time. The only "prejudice" they faced was that they might have to share their portion of the revenue with Petitioner, just as Williams, Jr. and the Acuff/Rose Respondents had been required to

share the revenue with Berlin and the Aberbach Respondents beginning in 1975. Such pecuniary detriment is not the type of prejudice which supports a laches defense. *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984).

The only transaction entered into during the period of supposed delay was the May 1985 acquisition by Respondents Acuff-Rose-Oryland Music, Inc. and Milene Opryland Music, Inc. of the assets of certain of the other Acuff/ Rose Respondents. However, that purchase agreement includes a provision which protects those Respondents from losses resulting from claims such as Petitioner's. It allows them to withhold payments due the sellers pending a revaluation of the assets in light of the claim. Moreover, those Respondents valued the assets (which include more than the Williams, Sr. renewal copyrights) based on what they believed the 50% publishers' share of the revenue would be, which is all they ever would keep. How many people might have to participate in the writers' 50% share of that revenue is of no concern to them.

Petitioner respectfully submits that plenary review of the lower court's decision is required not simply because it is erroneous, but because that error will create great confusion and uncertainty in the future administration of the copyright laws. The Court of Appeals redesigned §§24 and 304(a) by adding a time period of uncertain duration in which to take action the statutes do not require. That it did so on the basis of conjecture in reviewing a summary judgment makes plenary review by this Court imperative.

IX. CONCLUSION

De Sylva v. Ballentine created the likelihood that similarly situated individuals would be treated differently with respect to ownership of renewal copyrights. Congress eliminated that unjust condition when it enacted the 1976 Act. The lower court's decision once again creates uncertainty and lack of uniformity in this very important area of copyright law, which can only be resolved by this Court. For these various reasons, Petitioner respectfully requests that her petition be granted.

Respectfully submitted,

MILTON A. RUDIN
Counsel of Record
JOSEPH L. GOLDEN
RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Boulevard
Beverly Hills, CA 90210
(213) 274-4844

Of Counsel:
KENNETH E. WARNER
COBLENCE, WARNER, HAMILTON & SMITH
1370 Avenue of the Americas
New York, NY 10019
(212) 957-9700

Attorneys for Petitioner

August 18, 1989

APPENDIX F-2

No. 89-295

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CATHY YVONNE STONE,

Petitioner,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, A Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

MOTION TO DEFER CONSIDERATION
OF PETITION FOR WRIT OF CERTIORARI

MILTON A. RUDIN
Counsel of Record
JOSEPH L. GOLDEN
RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Boulevard

F-2.2

Beverly Hills, CA 90210
(212) 274-4844

Of Counsel:

KENNETH E. WARNER
COBLENCE, WARNER, HAMILTON & SMITH
1370 Avenue of the Americas
New York, NY 10019
(212) 957-9700

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

Petitioner Cathy Yvonne Stone ("Petitioner") hereby respectfully moves the Court to defer consideration of her Petition for Writ of Certiorari until after the Court of Appeals for the Second Circuit has ruled on her Petition for Rehearing and Suggestion for Rehearing In Banc. In the alternative, Petitioner respectfully moves that consideration of her Petition be deferred for an initial period of 60 days, with leave granted to permit Petitioner to file another motion to defer consideration if the Court of Appeals has not ruled by the end of the initial period. *See, e.g., Murray v. City of New York*, 308 U.S. 528 (1940), 309 U.S. 696 (1940), 310 U.S. 610 (1940). As grounds for said motions, Petitioner states as follows:

1. The Court of Appeals entered its judgment and opinion on April 21, 1989, which is reported at 873 F.2d 620 (2d Cir. 1989). Petitioner timely filed a Petition for Rehearing. That Petition was denied on May 23, 1989, requiring Petitioner to file her Petition for Writ of Certiorari no later than August 21, 1989. Supreme Court Rule 20.4.

2. On August 1, 1989, Petitioner filed a Motion for Recall on Mandate and Order Granting Leave to File Petition for Rehearing and Rehearing In Banc in the Court of Appeals. She did so to enable that Court to reconsider its decision in light of the Alabama Supreme Court's decision in *Stone v. Gulf American Fire and Casualty Co.*, ___ So.2d ___ (Ala., July 5, 1989) and *New Era Publications International ApS. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), both of which Petitioner submits conflict with the court of Appeals' decision in this case.

3. The Court of Appeals had not ruled on that motion by the time the Petition for Writ of Certiorari was due. That Petition was filed on August 19, 1989 and Petitioner advised the Court of the then current status of the proceedings in the Court of Appeals (Petition at 30, n. 10).

4. On August 27, 1989, the Court of Appeals recalled its mandate and granted Petitioner leave to file a Petition for Rehearing and Suggestion for Rehearing In Banc. Petitioner did so on September 6, 1989, and Respondents timely filed their briefs in opposition to the Petition. The Petition has been pending before the Court of Appeals since September 14, 1989. Petitioner cannot determine when that Court will render its decision.

5. Respondents were granted an extension of time until October 17, 1989 in which to file their Opposition to the Petition for Writ of Certiorari pursuant to Supreme Court Rule 29.4. That Opposition has now been filed.

6. Should the Court of Appeals grant the Petition for Rehearing, vacate its earlier opinion and reverse the decision of the District Court, there will be no need for this Court to consider the Petition for Writ of Certiorari because it will be moot. *Cf. S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

7. If the Court of Appeals grants the Petition but nevertheless affirms the District Court on grounds different from those stated in its decision, the questions to be addressed by this Court may change from those stated in the current Petition. Petitioner would be entitled to seek this Court's review of that new decision by way of a new Petition for Writ of Certiorari.

For the foregoing reasons, Petitioner respectfully requests that consideration of her Petition for Writ of Certiorari be deferred (a) until after the Court of Appeals has ruled on her Petition for Rehearing, or, in the alternative, (b) for 60 days to allow the Court of Appeals to rule on that Petition. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, §5.9 (6th ed. 1986). Petitioner will advise this Court promptly when the Court of Appeals renders its decision.

October 23, 1989

Respectfully submitted,

/s/ Milton A. Rudin
MILTON A. RUDIN
Counsel of Record
JOSEPH L. GOLDEN
RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Boulevard
Beverly Hills, CA 90210
(213) 274-4844

Of Counsel:
KENNETH E. WARNER
COBLENCE, WARNER, HAMILTON & SMITH
1370 Avenue of the Americas
New York, NY 10019
(212) 957-9700

Attorneys for Petitioner

No. 89-295

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

CATHY YVONNE STONE,
Petitioner,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, A Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Respondents.

CERTIFICATE OF SERVICE

I, MILTON A. RUDIN, a member of the Bar of the Supreme Court of the United States, hereby certify that on October 23, 1989, one copy of the foregoing Motion to Defer Consideration of Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to each of the following counsel of record for the Respondents herein. I further certify that all parties required to be served have been served.

Alan L. Shulman, Esq.
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street
New York, New York 10022

Lawrence I. Fox, Esq.
Berger, Steingut, Weiner,
Fox & Stern
600 Madison Avenue
New York, New York 10022

Thomas R. Levy, Esq.
300 East 42nd Street, 9th Floor
New York, New York 10017

/s/ Milton A. Rudin
Milton A. Rudin
RUDIN AND APPEL
A Professional Corporation
9601 Wilshire Boulevard, Suite 800
Beverly Hills, California
90210-5270
Counsel for Petitioner

APPENDIX F-3

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASINGTON, D.C. 20543

November 6, 1989

Mr. Lawrence I. Fox
Berger & Steingut
600 Madison Avenue
New York, NY 10022

Re: Cathy Yvonne Stone,
v. Hank Williams, Jr., et al.
No. 89-295

Dear Mr. Fox:

The Court today entered the following order in the above entitled case:

The motion of petitioner to defer consideration of the petition for certiorari is denied. The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniel, Jr., Clerk